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Nos. 636 and 651

In the Supreme Court of the United States

OCTOBER TERM, 1935

JAMES WALTER CARTER, PETITIONER

v.

CARTER COAL COMPANY, ET AL.

GUY T. HELVERING, ET AL., PETITIONERS

v.

JAMES WALTER CARTER, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR GOVERNMENT OFFICERS, RESPONDENTS IN NO. 636 AND PETITIONERS IN NO. 651

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OPINION BELOW

The opinion of the Supreme Court of the District of Columbia (R. 1179) is reported in 63 Wash. Law Reporter 986.

JURISDICTION

The decree of the Supreme Court of the District of Columbia was entered on December 10, 1935.

(R. 216A.) Appeals were taken to the United States Court of Appeals of the District of Columbia on December 10, 1935, and petitions for writs for certiorari filed in this Court prior to hearing or submission of the appeal in the Court of Appeals. Both petitions were granted December 23, 1935. Jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED IN NO. 636

1. Whether the tax imposed by the Bituminous Coal Conservation Act is constitutional if its regulatory provisions are constitutional.

2. Whether the provisions of the Act with respect to price regulation—

(a) are a valid exercise of the power of Congress to regulate commerce among the several states;

(b) infringe any rights guaranteed by the due process clause of the Fifth Amendment; or

(c) constitute an invalid delegation of legislative authority.

3. Whether the provisions of the Act regulating unfair methods of competition are a valid exercise of the commerce power of Congress.

4. Whether the provisions of the Act with respect to regulating minimum wages and maximum hours of labor and its provisions prohibiting interference by employers with their employees' right to organize and bargain collectively—

(a) are a valid exercise of the commerce power of Congress;

(b) infringe any rights guaranteed by the due process clause of the Fifth Amendment; or

(c) constitute an invalid delegation of legislative power.

5. Whether, if any of the provisions of the Act are invalid, its remaining provisions, as well as the code provisions corresponding to such remaining provisions, are severable and valid.

QUESTION PRESENTED IN NO. 651

Whether the trial court erred in permanently enjoining the collection of the tax, in excess of 10% thereof, which had accrued prior to the entry of its decree.

STATUTE INVOLVED

The Bituminous Coal Conservation Act of 1935 is set forth in the Appendix, *infra*, pp. 289 to 325. Its major provisions are summarized here for the convenience of the Court.

Section 1 (*infra*, p. 289) states that it is hereby "recognized and declared" that the production and distribution of bituminous coal "directly affect" interstate commerce and render regulation thereof "imperative for the protection of such commerce"; that overexpansion of the industry has led to practices and methods of production, distribution, and marketing that "disorganize * * * burden and obstruct" interstate commerce in such coal;

that regulation of production and prices is necessary in order to promote interstate commerce and remove burdens and obstructions therefrom; and that the right of mine workers to organize and bargain collectively "should be guaranteed in order to prevent constant wage cutting and the establishment of disparate labor costs detrimental to fair competition in the interstate marketing of bituminous coal, and in order to avoid those obstructions to its interstate commerce that recur in industrial disputes over labor relations at the mines." As a basis for these findings, Congress had before it not only the hearings conducted in the course of its consideration of the present legislation, but the facts as to conditions in the industry disclosed by numerous prior Congressional hearings, reports and investigations. (*Infra,* pp. 15–23.)

Section 2 (*infra,* pp. 290–293) provides for the creation of a National Bituminous Coal Commission (hereinafter referred to as the Commission).

Section 3 (*infra,* p. 293) imposes upon the sale or other disposal of all bituminous coal produced within the United States an excise tax of 15% on the sale price at the mine, or, in the case of captive coal, on the fair market value of the coal at the mine. The tax is payable monthly on or before the first day of the second succeeding month. There is a proviso that any coal producer who has filed with the Commission his acceptance of the code provided for in Section 4 of the Act shall be

entitled to a drawback in the form of a credit equal to 90% of the amount of the tax. It is further provided that no producer shall by reason of his acceptance of the code or the drawback be "precluded or estopped from contesting the constitutionality of any provision of said code, or its validity as applicable to such producer."

Section 4 (*infra*, pp. 294–313) states that its provisions shall be formulated into a code and that this code "shall contain the following conditions, provisions, and obligations which will tend to regulate interstate commerce in bituminous coal and transactions directly affecting interstate commerce in bituminous coal."[1] The contents of the code, as thereafter set forth in Section 4, are divided into three parts designated Part I, Part II, and Part III, each part in turn containing several subsections.

Part I provides for the election by producers of district boards in 23 coal producing districts, the boundaries of which are specified in the Annex to the Act. Establishment of voluntary marketing agencies is authorized, but they are required to function under such general rules and regulations as the district boards and the Commission may approve.[2]

[1] The code actually formulated by the Commission (Pl. Ex. 15, R. 786–804) follows verbatim the language of all substantive provisions of Section 4.

[2] By Section 13 (*infra*, p. 322) the sale of coal at prices determined by a marketing agency which the Commission has not approved is made unlawful under the Sherman Act.

Part II contains the provisions relating to establishing minimum prices and, under certain circumstances, maximum prices, and a specification of certain practices which are declared to be unfair methods of competition.

Subsections (a) and (b) contain the provisions for determining minimum prices, which may be summarized in their main outlines as follows. The district boards are required to compute the weighted average cost of production per ton for their respective districts. These cost figures are to be submitted to the Commission which is to compute the weighted average cost of production per ton for each of the "minimum price areas", into which the districts are grouped. The latter cost figure is used as the basis for determining specific prices which reflect the relative market values of the various kinds, qualities and sizes of coal. These specific prices are to be submitted to the Commission, which may approve, disapprove or modify them. Subject to rules and regulations prescribed by the Commission, these prices are then to be coordinated so as to afford the producers in the several districts substantially the same opportunity to dispose of their coals upon a competitive basis as has heretofore existed. These coordinated prices become binding only upon approval by the Commission, which has power to approve, modify or disapprove them. The Commission is authorized, upon the petition of any district board or other party in interest or on its own motion, to determine,

after hearing, whether the method of fixing prices is prejudicial to any district and to correct such prejudice if found. The Commission may also conduct hearings where complaint is made by any code member, district board, State, or political subdivision of a State that is dissatisfied with the coordination of prices, and may make such order as may be required to effectuate the purpose of the price regulatory provisions of the Act. Such orders are subject to judicial review under Section 6.

By Subsection (c) the Commission is authorized to fix maximum prices f. o. b. mine for coal in any district when it deems such action necessary in the public interest in order to protect the consumer against unreasonably high prices. The basis for determining such maximum prices is specified and it is provided that no maximum price shall be established for any mine which shall not return cost plus a reasonable profit.

Subsection (e) provides that no code member shall sell or contract to sell coal at prices below the minimum or above the maximum approved or established by the Commission. It further provides that, until minimum prices are established, no contract for the sale of coal shall be made providing for delivery for a period longer than 30 days from the date of the contract.

Subsection (i) describes certain practices, which the section declares shall be unfair methods of com-

petition and shall constitute violations of the code. They include such practices as consigning unordered or unsold coal, granting secret rebates, discriminatory credit allowances or other price discriminations, commercial bribery, false advertising or misrepresentation of size or quality, unauthorized use of trade names or trademarks, and inducing breach of contract.

Part III (*infra,* pp. 310–313) deals with labor relations. It provides (Subsec. (a)) that employees shall have the right to organize and bargain collectively through representatives of their own choosing without interference, restraint or coercion by employers, and that no employee shall be required as a condition of employment to join any company union; and also (Subsec. (b)) that employees may select their own checkweighmen, and shall not be required as a condition of employment to live in company houses or to trade at company stores. Subsection (g) provides that whenever maximum hours of labor are agreed upon in contracts negotiated between producers of more than two-thirds of the annual national tonnage and representatives of more than one-half of the employees, such maximum hours shall be binding upon all code members. Similarly, if wage agreements are negotiated by collective bargaining in any district or group of districts between representatives of more than two-thirds of the producers by tonnage and of more than a majority of the mine workers, such

wages shall be binding as minimum wages upon code members in such district or group of districts.

Subsections (c) to (f) provide for the establishment of a Bituminous Coal Labor Board to administer the provisions of Part III. This Board may offer its services as mediator or, upon the request of the parties, may arbitrate labor disputes in the industry.

Section 5 (*infra*, pp. 313–315) includes provisions relating to enforcement. The Commission may, after due notice and hearing, upon proof of willful violation of the code, either issue a cease and desist order against the violator or revoke his membership in the code and his right to a drawback on the taxes levied under Section 3.[1] (Sec. 5 (b).)

Section 6 (*infra*, pp. 315–318) contains elaborate provisions for judicial review of the orders of the Commission. Any person aggrieved by any order issued by the Commission in a proceeding to which such a person is a party may obtain a review theref in the proper Circuit Court of Appeals or in the United States Court of Appeals for the District of Columbia. The reviewing court is granted exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. At the suit of either party the court may order additional evidence to be taken before the Commission where reasonable

[1]Any producer whose membership in the code has been revoked shall have it restored upon payment of all taxes in full for the time during which his violation of the code shall be found to have continued (Sec. 5 (c)).

grounds for failure to adduce such evidence in the original hearing before the Commission are shown. The court in such proceeding may stay the order of the Commission. The judgment of the Court of Appeals is subject to review in this Court upon certiorari or certification. (Sec. 6 (b).) These provision for judicial review apply, not only to cease and desist orders and orders of revocation of membership, but also to orders with respect to complaints that the method of fixing minimum prices is prejudicial to any district (Sec. 4, Part II (b)), orders with respect to complaints of dissatisfaction with coordination of prices, and orders establishing maximum prices (Sec. 4, Part II (d)).

In a similar manner the Commission may apply to the proper Circuit Court of Appeals for the enforcement of its orders if any code member fails or neglects to comply therewith (Sec. 6 (c)). Thus no order of the Commission becomes effective without an opportunity for judicial review. There is also a provision for a civil forfeiture of fifty dollars for failure to file reports required by the Act or the code. (Sec. 9 (c).)

Section 15 provides that if any provision of the Act or the application thereof to any person or circumstances is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

Section 21 provides that the Act shall cease to be in effect four years from the date of its approval.

STATEMENT

THE PROCEEDINGS BELOW

This suit was brought by petitioner,[1] a stockholder and the president of the Carter Coal Company, against the Carter Coal Company and its officers and directors to restrain them from filing an acceptance of the Bituminous Coal Code (hereinafter referred to as the code) formulated pursuant to the Bituminous Coal Conservation Act of 1935, and from paying any tax imposed by said Act, and against certain taxing officials and law-enforcement officers of the Government to restrain them from assessing or collecting any tax imposed by the Act, or from otherwise enforcing the taxing provisions. The Act was approved on August 30, 1935, and the bill of complaint was filed in the Supreme Court of the District of Columbia on August 31, 1935.

Petitioner alleged that he was a minority stockholder of the Carter Coal Company and that he had formally demanded that the company should not comply with the Bituminous Coal Conservation Act, become a member of the code, or pay the taxes provided for in the Act. The basis of the demand was that the Act was unconstitutional and that acceptance of the Code by the company would be *ultra vires* and destructive of its business. It was further alleged that the directors of the company, although concurring in the view that the Act was

[1] Petitioner in No. 636, who is respondent in No. 651, will be referred to in this brief as petitioner.

unconstitutional, refused petitioner's demand upon the ground that the tax imposed by the Act upon bituminous coal producers who did not accept the code would seriously damage the company. The bill also alleges that a stockholders' meeting, called to consider petitioner's demand, approved the action of the directors. The bill (and its amendments) contains allegations of irreparable damage if the relief prayed for is not granted and requested both permanent and temporary relief against all of the defendants.

The answer of the Carter Coal Company and its officers and directors admitted the allegations of fact in the bill of complaint, and alleged that they intended to accept the code for the reason that a 15% tax on all sales by the company would result in irreparable and serious damage to the company and might result in its bankruptcy. (R. 39–42.)

The answer of the defendant Government officers put petitioner to his proof on other than formal matters, denied petitioner's allegations as to the unconstitutionality of the Act, and set up as a separate defense a brief description of conditions in the bituminous coal industry relevant to the constitutionality of the regulatory provisions of the Act. (R. 28–37, 104–107.)

In an oral opinion rendered at the conclusion of the trial, the Supreme Court of the District of Columbia held that petitioner was entitled to maintain his suit, that those portions of the Act which

provide for regulating prices and unfair methods of competition are valid, that the labor provisions of the Act are not within the federal commerce power [1], and that the other provisions of the Act are severable from its labor provisions. (R. 1179–1198.) In view of these conclusions the court held that the Carter Coal Company was subject to the tax imposed by the Act.

The decree which the court entered dismissed the bill of complaint, but granted a permanent injunction against collection of the tax, in excess of 10% thereof, which had accrued prior to the date of the decree. (R. 216A–216D.) The court also granted a temporary injunction, pending final determination, restraining the Carter Coal Company from accepting the code or paying the tax imposed by the Act and restraining the defendant government officers from collecting the tax, conditioned upon the payment to a depositary approved by the court of a sum equal to 10% of the tax during the period from November 1, 1935, to final determination. (R. 216D–216E.)

[1] It appears from the court's findings and opinion that it found that the wage scale in the bituminous coal industry substantially affected interstate competition, the price of coal in interstate commerce, and the movement of coal in such commerce, and that it held the wage and other labor provisions of the Act not within the federal commerce power solely because it interpreted *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, as holding that wages and labor relations are, as a matter of law, indirect in their effect on interstate commerce.

The court at the time it entered its decree filed detailed findings of evidentiary facts (R. 111–207), findings of ultimate fact (R. 208–212), and conclusions of law (R. 213–215). The findings are based upon the evidence introduced by the Government in substantiation of the Congressional findings of fact and in refutation of petitioner's claims that the regulatory provisions of the Act are not a valid exercise of the power of Congress to regulate interstate commerce, and that they are arbitrary, unreasonable and violative of due process. The evidence consisted of testimony taken in open court and a large number of exhibits. The parties also stipulated (R. 579–583) that the trial court and any appellate court might take judicial notice of the contents of various Congressional hearings and reports and Government publications. Petitioner's evidence in his opening was confined to proof in support of his right to equitable relief.

The writ of certiorari granted on petitioner's application in No. 636 brings before this Court for review the action of the trial court in dismissing petitioner's bill. The writ of certiorari granted on the application of the defendant government officers in No. 651 raises solely the question of the correctness of the trial court's action in permanently enjoining collection of more than 10% of the taxes which had accrued prior to the entry of the decree.

THE LEGISLATIVE BACKGROUND

The action of Congress in passing the Bituminous Coal Conservation Act of 1935 came as the result of more than twenty years' consideration of the bituminous coal problem and of a consequent conviction that the business of supplying the nation with this essential source of energy required Federal regulation. In the twenty-three years between 1913 and 1935, inclusive, there have been no less than 19 investigations or hearings by Congress or by specially created commissions with respect to conditions in the industry.[1] In these investiga-

[1] The official titles of these hearings are as follows:

1913. *Conditions in Paint Creek District, W. Va.*—Hearings before a subcommittee of Senate Committee on Education and Labor, 63d Congress, 1st Session, pursuant to S. Res. 37, authorizing investigation of Paint Creek District. 2298 pp., 2 maps.

1914. *Conditions in the Coal Mines of Colorado.*—Hearings before the Sub-committee of the Committee on Mines and Mining pursuant to H. Res. 387, a resolution authorizing and directing the Committee on Mines and Mining to make an investigation of conditions in the coal mines of Colorado. Report on the coal strike investigation made under H. R. 387, printed as House Document 1630, 63d Congress, 3d Session.

1916. *Report of the Colorado Coal Commission on the labor difficulties in the coal fields of Colorado, during the years 1914 and 1915.*—Printed as House Document 859, 64th Congress, 1st Session, with letter of transmittal from the President of the United States.

1917. *Price Regulation of Coal and Other Commodities.*—Hearing before Committee on Interstate Commerce, United States Senate, 65th Congress, 1st Session, on

tions and hearings, Congress has inquired into and obtained information in connection with every aspect of the bituminous coal industry.

S. 2354, a bill to amend the Act to Regulate Commerce, and on S. J. Res. 77, to provide further for the national security and defense by regulating the production, sale, and distribution of coal. 503 pp.

1917–1918. *Shortage of Coal.*—Hearings before the subcommittee of Senate Committee on Manufactures, 65th Congress, 2d Session, pursuant to S. Res. 163, directing the Committee to investigate causes of shortage of coal and sugar. Coal. 1788 pp., 3 Vols.

1919–1920. *Increased Price of Coal.*—Hearings before a Subcommittee of the Committee on Interstate Commerce, United States Senate, 66th Congress, 1st Session, pursuant to S. R. 126, directing the Committee on Interstate Commerce to hold hearings in order to make inquiry into the causes which have brought about the enormous increase in the market price of coal and to report its findings and recommendations with a view to Congressional or executive action. 1139 pp., 4 Vols.

1920. *United States Bituminous Coal Commission: Majority and minority reports to the President.*—120 pp. (Commission was appointed by Executive Communication dated December 6, 1919.)

1920–1921. *Coal and Transportation.*—Hearings before the Select Committee on Reconstruction and Production, United States Senate, 66th Congress, 3d Session, pursuant to S. Res. 350. 2361 pp., 3 Vols.

1921. *Publication of Production and Profits in Coal.*—Hearings before a Senate Committee on Manufactures, 66th Congress, 3d Session, on S. 4828, a bill to promote the general welfare by gathering information respecting the ownership, production, distribution, costs, sales, and profits in the coal industry and by publication of same, and to recognize and declare coal and its production and dis-

A number of these investigations have dealt with bitterly contested strikes arising from failure of producers in certain areas to recognize the right of their employees to bargain collectively. These in-

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tribution charged with public interest and use 2235 pp., 3 Vols.

1921. *The Coal Problem.*—Hearings before a subcommittee of Senate Committee on Interstate Commerce, 67th Congress, 1st Session, on S. 41, to provide for seasonable rates for the transportation of coal; on S. 42, to provide for the appointment of a Federal Coal Commissioner; on S. 824, to provide for a Federal Coal Commissioner and directing the Director of the Geological Survey to act as such commissioner. 43 pp.

1921. *West Virginia Coal Fields.*—Hearings before the Committee on Education and Labor of the Senate on Conditions in the West Virginia Coal Fields, 67th Congress, 1st Session, pursuant to S. Res. 80, directing the Committee on Education and Labor to investigate the recent acts of violence in the coal fields of West Virginia and adjacent territory and the causes which led to the conditions which now exist in said territory.

1922. *Investigation of Wages and Working Conditions in the Coal Mining Industry.*—Hearings before House Committee on Labor, 67th Congress, 2nd Session, on H. R. 11022, to establish a Commission to inquire into labor conditions in the coal industry. 561 pp.

1923. *Report of the United States Coal Commission.*—Transmitted pursuant to the Act approved September 22, 1922 (public No. 347). 2719 pp., 4 vols. and Atlas. S. Doc. No. 195, 68th Congress, 2d Session.

1926. *Coal Legislation.*—Hearings before the Committee on Interstate and Foreign Commerce, House of Rep-

cluded the investigations of the disorders in West Virginia in 1913 and 1920–21, in Colorado in 1914

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resentatives, 69th Congress, 1st Session, on Coal Legislation.

1928. *Conditions in the Coal Fields of Pennsylvania, West Virginia, and Ohio.*—Hearings before the Committee on Interstate Commerce, United States Senate, 70th Congress, 1st Session, pursuant to S. Res. 105, a resolution to investigate conditions in the coal fields of Pennsylvania, West Virginia, and Ohio.

1929. *Bituminous Coal Commission.*—Hearings before the Committee on Interstate Commerce, United States Senate, 70th Congress, 2d Session, on S. 4490, a bill to regulate interstate and foreign commerce in bituminous coal, provide for consolidations, mergers, and cooperative marketing; regulate the fuel supply of interstate carriers; require the licensing of corporations producing and shipping coal in interstate commerce; and to create a bituminous coal commission, and for other purposes.

1932. *To Create a Bituminous Coal Commission.*—Hearings before a subcommittee of the Committee on Mines and Mining, United States Senate, 72nd Congress, 1st Session, on S. 2935, a bill to regulate interstate and foreign commerce in bituminous coal; provide for consolidations, mergers, and cooperative marketing; require the licensing of corporations producing and shipping coal in interstate commerce; and to create a bituminous coal commission; and for other purposes. 1351 pp., 2 vols.

1935. *Stabilization of the Bituminous Coal Mining Industry.*—Hearings before a subcommittee of the Committee on Interstate Commerce, United States Senate, 74th Congress, 1st Session, on S. 1417, a bill to stabilize the bituminous coal industry and promote its interstate commerce, etc. 624 pp.

1935. *Stabilization of Bituminous Coal Mining Industry.*—Hearings before a subcommittee of the Committee on Ways and Means, House of Representatives, 74th Congress, 1st Session, on H. R. 8479. 661 pp.

and 1915, and in West Virginia, Ohio, and Pennsylvania between 1925 and 1927.[1] These disorders frequently resulted in bloodshed and martial law, and on at least four occasions were restrained only by the intervention of Federal troops.[2]

Another series of investigations was concerned with shortages and high prices.[3] The shortage occurring during the World War had impressed upon the public the critical importance of a constantly adequate supply of fuel. For a time lack of coal became a limiting factor in the military program, and after extended hearings Congress authorized the control of distribution and also the fixing of maximum prices. (Fg. 83, R. 152–153.) When the strike of 1919 closed down mines employing 415,000 men, the war-time powers were again invoked to establish maximum prices and to control distribution, and the United States Bituminous Coal Commission was appointed to arbitrate the issues. (Fg. 84, 87, R. 152–155.) When maximum prices were removed, prices rose to an all-time peak (*Ibid*) and protests from consumers led to further congressional investigations.[4] When a

[1] See the investigations of 1913, 1914, 1916, 1921, and 1928, referred to in note on pp. 15, 17, 18, *supra*.

[2] R. 447, 498; Report of the Colorado Coal Commission, House Document 859, 64th Cong., 1st Session; Report of The Secretary of War, 1920, pp. 71–72; West Virginia Coal Fields, Hearings before the Committee on Education and Labor of the Senate, 67th Cong., 1st Session.

[3] See the investigations between 1917 and 1923 listed in the note on pp. 15–17, *supra*.

[4] See the investigations of 1920 and 1921, listed in the note on p. 16, *supra*.

tremendous strike in 1922 closed down 73 percent of the mining capacity of the nation, forced industries to shut down for lack of fuel,[1] and raised prices again to exorbitant heights, Congress once more provided for Federal control of distribution and also, in order to determine the causes underlying these repeated interruptions to the movement of coal, created a fact finding commission with instructions to investigate the industry and report its findings to Congress with recommendations for legislation. (Fg. 87, R. 154.) This commission made an exhaustive study of the problems of the industry, filing a 2719 page report with Congress in 1923.

The investigations after 1923 dealt with the disastrous effects of the destructive competition in the industry emphasized by the series of important strikes between 1925 and 1927. In the hearings held in 1926, 1928, 1929, 1932 and 1935, the plight of the bituminous coal industry—the surplus capacity, the cut-throat competition, the price cutting and the wage cutting, the consequences of the breakdown of the machinery of collective bargaining, the continuous and heavy financial losses, the violence and disorder in the mining communities—were all fully revealed.

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[1] United States Geological Survey, Coke and By-Products, Mineral Resources of the United States, 1922, Part II, pp. 676–677. Lack of coal for coke forced the shutting down of 26 iron blast furnaces in July and 36 more in August.

Some of these investigations also considered the waste of coal resources. Congress instructed the fact-finding Commission of 1922 to investigate the "waste of coal" in mining, and the Commission reported that the avoidable loss of bituminous coal under methods then in use was at the rate of 150,000,000 tons in a year of normal production.[1] In January, 1935, the President transmitted to Congress the Report of the National Resources Board and Mineral Policy Committee. The Committee, confirming the findings of the 1922 Commission, reported that "the great underlying cause" of the excessive waste in the mining of coal is "destructive competition."[2] (R. 1142.)

During this period many proposals for remedying the condition of the industry were before Congress. Proposals for permanent peacetime legislation began to be made early in 1919. These earlier proposals dealt principally with protecting the consumer against shortage of supply and exorbitant prices. They emphasized publicity of accounts, compulsory fact finding and ascertainment of costs and profits, mediation in labor disputes, and, in several instances, regulation of maximum

[1] Report of the U. S. Coal Commission, pp. 188, 189, 1858; U. S. Geological Survey, "Coal in 1923", p. 576.

[2] House Document No. 84, 74th Congress, 1st Session, Message from the President of the United States Transmitting a Report of the National Resources Board, etc., January 24, 1935. National Resources Board, Report, December 1, 1934, p. 402.

prices. Such were the characteristic features of the legislation urged by the Senate Interstate Commerce Committee, the Senate Committee on Manufactures, and by members of the Select Committee on Reconstruction and Production in the years 1920 and 1921.[1]

As early as 1921, Senator Kenyon of Iowa, who was chairman of the Senate committee which investigated the disorders in West Virginia in 1920–1921 and was also a member of two of the three Senate committees which in the same year investigated the shortages and sky-rocketing prices of that period, recommended Federal legislation declaring coal to be a public utility and prescribing a code to govern the labor relations of those engaged in its production.[2] The United States Coal Commission of 1923 recommended that there be continuous fact finding with respect to conditions in the industry and that a Federal license be required of shippers of coal in interstate commerce. (Vol. I, pp. 265, 269.) Bills providing for fact finding, for the mediation of labor disputes, and for Federal control of distribution in emergencies were introduced in 1926, and hearings were held thereon. (H. R.

[1] Senate Report No. 55, 67th Congress, 1st Session, (Calendar No. 54); S. 4828, 66th Congress, 3d Session; Senate Report No. 815, 66th Congress, 3d Session, (Calendar No. 782).

[2] S. 2557, 67th Congress, 1st Session; S. 3147, 67th Congress, 2d Sess. See Kenyon, *A Code of Industrial Law*, Annals of the American Academy of Political and Social Science, Vol. CXI, January 1924, pp. 305–313.

11898, 9222, S. 4177, 69th Cong., 1st Sess.) In 1928 bills were introduced to exempt combinations of coal producers, when approved by a governmental agency, from the operation of the antitrust laws. (H. R. 8523, 4490, 70th Cong., 1st Sess.) Hearings were held in 1929 on H. R. 4490, which provided for the fixing of maximum prices, for licensing interstate shippers, and for guaranteeing the right of collective bargaining. In 1932 hearings were held on similar bills (H. R. 7536, S. 2935, 72nd Cong., 1st Sess.), providing for exemptions from the antitrust laws and for collective bargaining, as well as on more detailed proposals for the establishment of minimum and maximum prices and the allocation of production (H. R. 9924, 12916, 72nd Cong., 1st Sess.).[1] At that time it was still hoped that the chaotic conditions might be improved through the organization of voluntary sales agencies.

The bituminous coal industry was one of the first to submit a code under the National Industrial Recovery Act in 1933, and it operated under such a code from September, 1933 to May, 1935. Whatever criticism may be directed at the operation of other codes it is noteworthy that during hearings on the present Act, there was substantial unanimity of opinion that conditions in the bituminous coal industry had been greatly improved under the

[1] H. R. 12916 provided for a code, a 10-percent tax, and a 98-percent drawback to code members who comply with its provisions.

scheme of regulation which its code provided.[1] (Fg. 146–152, R. 197–200.) Congress thus had before it when it passed the Bituminous Coal Conservation Act the experience of the industry and of coal consumers under a system of Federal regulation, as well as a vast amount of information as to the problems of the industry in the past.

The law which Congress finally passed is, therefore, the result of nearly a quarter of a century of accumulated experience and discussion.[2] It contains features of many of the earlier proposals for legislation, such as maximum prices to protect the consumer, compulsory fact finding with prescription of the forms of accounts and a procedure for the mediation of disputes between employer and employees. The Act also contains features which emerged in later investigations centering about the peculiarly destructive effects in this industry of the competitive cutting of prices and wages. These include the authorization of marketing agencies under public supervision, the out-

[1] Mr. Carter, the petitioner herein, testified before the Senate Committee having under consideration the present Act: "I believe that there is a substantial agreement in the industry that the Code has been a benefit to the coal industry." (R. 277.)

[2] The report of the House Committee on Ways and Means recommending passage of the bill refers to the Congressional hearings of 1935, 1929, 1928, and 1926, and to the report of the United States Coal Commission of 1923 as furnishing the background for the proposed legislation. The Congress also had before it H. R. Doc. No. 84, 74th Cong., 1st Sess., transmitting a report of the National Resources Board. The portions of this report pertaining to coal are printed in the Record as Defendant's Exhibits 43–43C, R. 1125–1154.

lawing of unfair trade practices, the fixing of minimum prices, protection of the right of employees to bargain collectively and provision for investigations of resource waste and conservation. The Act also contains new features relating to maximum hours of labor and minimum rates of pay.

The Act before the Court must be considered in the light of this quarter-century of legislative discussion. The declaratory findings of fact of the Congress that coal is affected with a public interest, that commerce in coal is disorganized, that conditions and practices in the industry burden and obstruct commerce and waste resources, and that recurring industrial disputes obstruct commerce, would appear to be amply confirmed by the record established through these investigations. In passing the Bituminous Coal Conservation Act of 1935 Congress was dealing not with a passing emergency but with a chronic condition which it had watched develop over many years. The findings made and the remedies proposed were designed to meet that situation as a whole. The facts brought out in detail in the many volumes comprising the record of these Congressional investigations, and in a summary fashion in the record presented in this case, afford ample justification for this conclusion. These facts are further summarized below.

THE FACTS OF THE BITUMINOUS COAL INDUSTRY

Importance of Bituminous Coal.—The importance of bituminous coal in our national life, its

primary position as a source of energy for heat and power, and the dependence of the entire industrial and commercial life of the nation upon an adequate and uninterrupted supply are matters of such common knowledge that they do not call for discussion here. The subject is summarized from a statistical standpoint in Findings 42 to 45, inclusive (R. 129–131).

How Bituminous Coal is Sold.—The general custom in the bituminous coal industry is for the producer of coal first to obtain orders for coal through selling agencies located in consuming markets in various parts of the country and then to mine the coal to fill such orders (Fg. 48, R. 132). When the coal is brought to the surface of the ground it is often separated into sizes by being run over screens, and is then loaded immediately into railroad cars for shipment to the purchaser (Fg. 49, R. 133). It is uneconomical to store coal and the mines generally do not maintain storage facilities. Consequently, coal is not ordinarily mined unless there is assurance that railroad cars will be available to receive it when it comes to the surface (*Ibid*). Since the orders frequently specify coal of a certain size, and since coal comes out of the mine in various sizes, it often happens that unsold sizes of coal are produced in the course of the mining operation (Fg. 48, R. 132). Coal in such unsold sizes is also immediately loaded into railroad cars which are held on the tracks at the mine until

sold, or until the mine tracks become congested. In the latter event, in order to avoid a suspension of mining operation, such unsold sizes are often consigned to some consuming market in the hope that they may be sold before demurrage charges consume their value. Producers are under heavy pressure to slash prices on such consigned shipments and the coal so consigned is known as distress coal (Fg. 50, R. 133–134).

Sales are customarily negotiated between producers and purchasers in the various States in terms of price f. o. b. mine, with a provision that the coal is to be shipped to the purchasers at a named destination (Fg. 51, R. 134). Such contracts often specify that there shall be no diversion of the coal in transit without the consent of the producer (*Ibid*). The producer generally orders the cars which are to carry the coal, loads the coal into the cars, gives the carrier shipping instructions, and the producer's shipping clerk furnishes the bill of lading either to the buyer or the producer (*Ibid*).

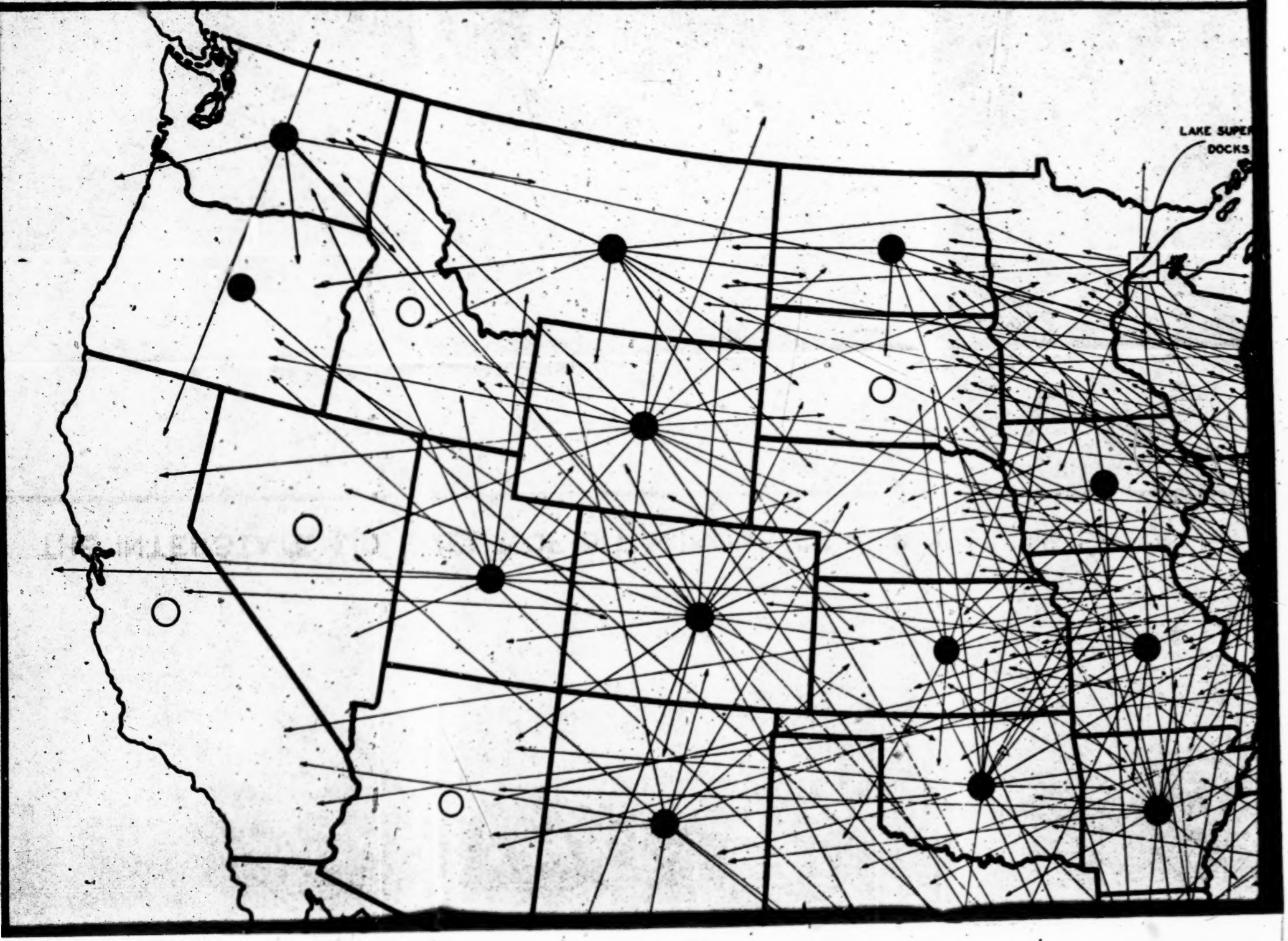
How Bituminous Coal is Distributed.—Most of the production of bituminous coal is sold in interstate commerce or for use in interstate commerce. In 1929 (the only year for which complete distribution figures are available), 50 per cent. of the coal produced was shipped to consumers (other than railroads) in States other than the State of production or in foreign countries, and 23.8 per cent. was sold to railroads subject to the jurisdic-

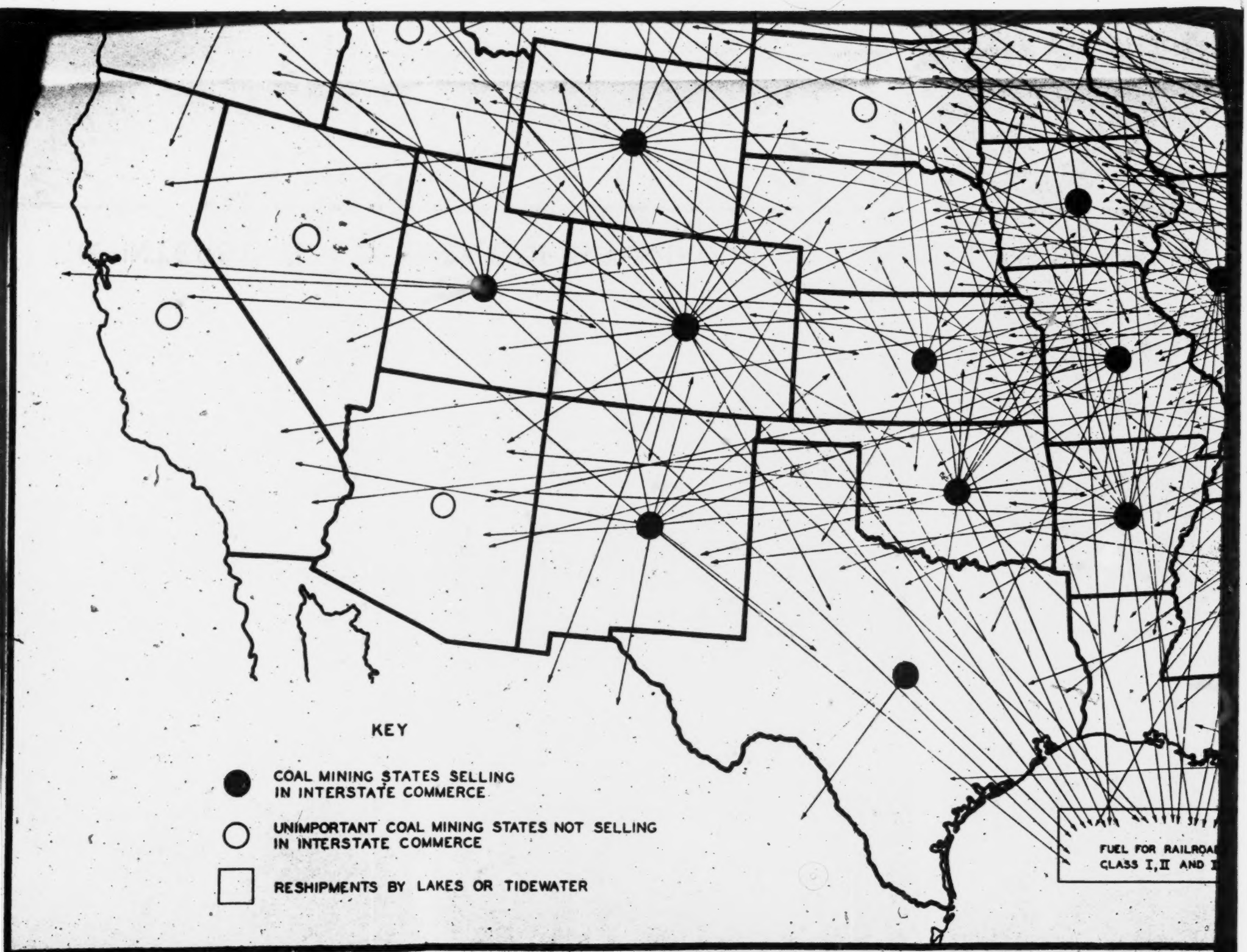
tion of the Interstate Commerce Commission (Fg. 47, R. 131; Def. Ex. 13, 14, R. 1018, 1019). Of this 23.8 per cent., 16.4 per cent. was delivered directly to the purchasing railroad at the mouth of the mine (Fg. 47, R. 131). The figures do not show how much of the coal sold to railroads was sold for transportation outside the State of production, or how much was used in interstate operations as distinct from local operations, but there can be little question in view of the concentration of coal resources and the nation-wide network of railroads that a considerable portion of the coal sold to railroads was sold for interstate shipment and that most of it was used in the course of interstate transportation.

Commercially important deposits of bituminous coal are found in 26 States, but the 4 States of Pennsylvania, West Virginia, Kentucky and Illinois produce over 70 per cent. of the total national production (75 per cent. in 1929, 74.3 per cent. in 1934) (Fg. 46, R. 131; Def. Ex. 36, R. 1083). Of the other producing States only Ohio and Indiana produced over 10,000,000 tons in 1934, out of a total national production of 358,000,000 tons in that year (Def. Ex. 36, R. 1083).

Coal mined in every State competes with coal mined in other States (Fg. 47, R. 132; Def. Ex. 10, R. 1015). In 1929, Pennsylvania shipped coal to 24 States and Canada, as well as to tidewater and lake cargo ports whence coal is shipped to a number of States and foreign countries. West Vir-

THE INTERSTATE MOVEMENT OF BITUMINOUS COAL IN 1929, AS SHOWN BY





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Drafting by R. L. Anderson. Data by F. G. Tryon and W. H. Young, Coal Economics Division, United States Bures

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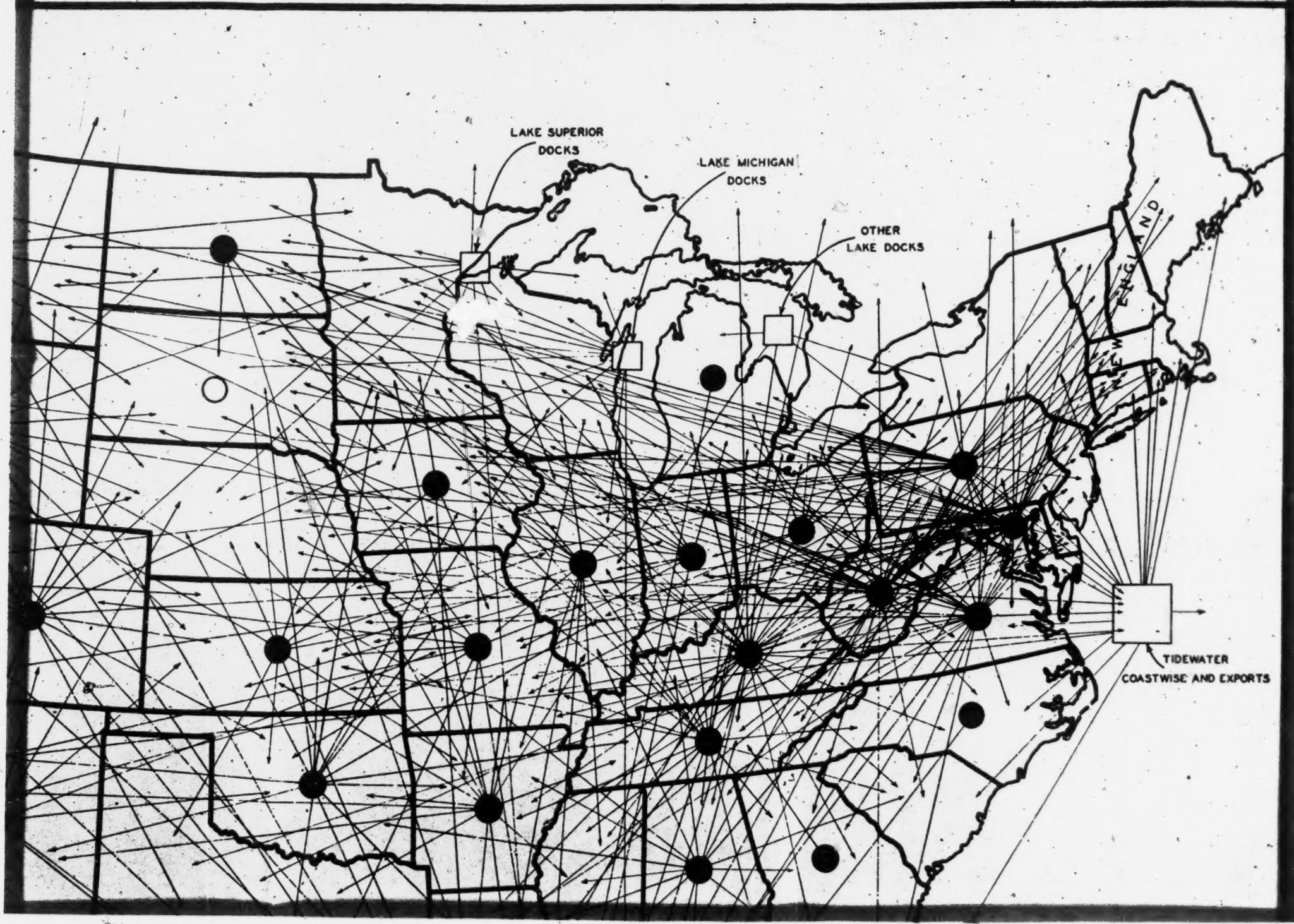

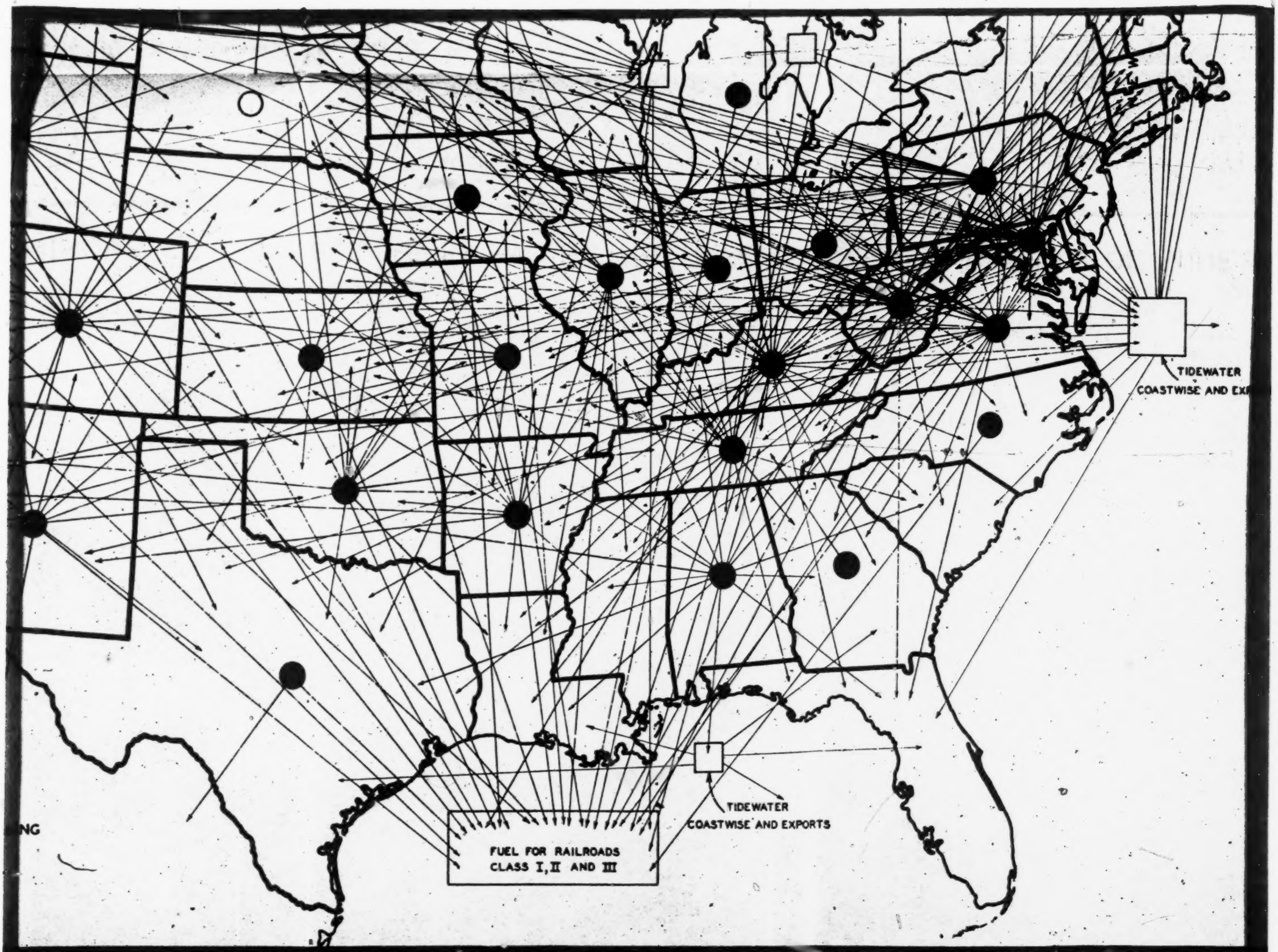

NE CONSUMING AREA FOR THE SHIPMENTS FROM KENTUCKY AND VIRGINIA, THE DESTINATION BY STATES NOT BEING KNOWN.

Anderson. Data by F. G. Tryon and W. H. Young, Coal Economics Division, United States Bureau of Mines, October 10, 1935.

ginia shipped to 31 States, Canada, and tidewater and lake cargo ports; Kentucky to 31, Canada, tidewater and lake cargo; Illinois to 14 States (Def. Ex. 9 and 10, R. 1014, 1015, 314). Maryland shipped to 30, Canada, tidewater and lake cargo; Virginia to 25; Tennessee to 19; Colorado to 18; Arkansas to 14; Alabama to 14; Utah to 12; Oklahoma to 14; Ohio to 8 and Montana to 9. Iowa received coal from 18 States, Nebraska from 16, Minnesota from 16, Illinois from 14, Kansas from 16, Texas from 10, California from 7, Michigan from 9, New York from 6, Pennsylvania from 6, West Virginia from 4 and Florida from 5 (Ibid). The interstate distribution of coal and the competition between areas are portrayed graphically in Defendant's Exhibit 10 (R. 1015) reprinted on the opposite page.

Over 97 per cent. of the coal produced in the West Virginia smokeless fields, in which the mines of the Carter Coal Company are located, is shipped in interstate commerce to consumers in 20 other States (Def. Ex. 1, R. 1001), and petitioner himself testified that "substantially all of the coal mined in the Carter Coal Company mines is sold and transported into States other than the State in which produced" (R. 253; Fg. 22, R. 121). Approximately 60 per cent. of the coal produced by the Carter Coal Company moves into the Middle West, both by rail and lake cargo shipment, approximately 20 per cent. to tidewater ports on the

Atlantic seaboard, from which it is shipped to the Northeast or abroad, and approximately 20 per cent. by rail to the Southeastern and Middle Atlantic States. (Fg. 23, R. 121.)

Prices and Interstate Commerce.—Competition in bituminous coal is necessarily based upon the delivered price to the purchaser (Fg. 67, R. 142). The delivered price consists of the f. o. b. mine price plus freight (*Ibid*). Because of the bulky nature and low value of coal per ton, transportation charges constitute an extremely high proportion of the total delivered cost (Fg. 99, R. 163).[1] From 1923 to 1933 freight charges ranged from 46.9 per cent. to 63.3 per cent. of the delivered value (Fg. 63a, R. 140). The freight rate, controlled by the Interstate Commerce Commission, is relatively inflexible, as compared with the f. o. b. mine price. Between 1923 and 1933 the average freight charge per ton ranged between $2.36 and $2.20. In 1932 it was only 10¢ lower than the $2.36 average in 1923 (*Ibid.*). The average f. o. b. mine price declined steadily from $2.68 in 1923 to $1.31 in 1932. In 1933 it was $1.34 (*Ibid.*).

Thus, although competition is based upon the ultimate cost to the purchaser at point of delivery, it manifests itself almost entirely in the sales price at the mine. Producers, of course, do not charge a

[1] In 1933 freight charges represented 62 per cent. of the total delivered value of bituminous coal, but only 11 per cent. of the delivered value of all commodities (Fg. 99, R. 163).

set or uniform mine price to all consumers. On the contrary, they vary their mine prices as between purchasers at different destinations in an endeavor to meet the competitive conditions existing in the various consuming markets. Buyers and sellers cannot control the freight rate, but they can determine the mine price, and they do this in the ordinary sale by individual bargaining in terms of price f. o. b. mine. Accordingly, a small change in the f. o. b. mine price of coal has a material effect upon the decision of a purchaser whether or not to buy from a particular producer, producing area or producing State (Fg. 47, R. 132). Even minor variations in the mine price directly influence and often determine who ships coal in interstate commerce, how much coal is shipped from a particular mine, field or State, and the channel of commerce in which the coal is carried (*Ibid*). Substantial variations or disparities in price, as between competing fields, such as have been common in the industry, directly determine and control the amount of coal moving in commerce from any particular mine, area or State, and the channels through which the coal moves. The extent to which commerce in coal is thus affected is well illustrated by Def. Exs. 30, 30A, 31 and 31A, which are tables and charts showing the fluctuations in shipments of coal from several important competing states attendant upon such mine price disparities.

The Relationship Between Interstate and Intrastate Prices.—There is substantial competition in coal sold for use in the State in which it is produced and coal shipped into the State in interstate commerce (Fgs. 47, 52, R. 132, 134, 376; Def. Ex. 9, 10, 15, 16; R. 1014, 1015, 1021, 1023). In all of the States producing coal, intrastate shipments meet active competition from coal produced in other States and shipped into the State in interstate commerce (Fg. 47, R. 132). In 1929, the important producing State of Pennsylvania received 6,600,000 tons of coal all rail from other States; West Virginia over 1,500,000 tons; Virginia 3,000,000 tons; Illinois and Indiana combined 32,000,000 tons; Ohio 38,000,000 tons; and Kansas and Missouri combined 9,000,000 tons (Def. Ex. 9).

Economic Condition of the Bituminous Coal Industry.—In 1933, in *Appalachian Coals Inc.* v. *United States,* 288 U. S. 344, this Court recognized that "The economic condition of the coal industry * * * 'for many years has been indeed deplorable' " (p. 361). "The industry was in distress" (p. 372). This distress was due to a surplus of productive capacity, coupled with conditions of destructive competition which were caused by, and which in themselves accentuated, the overcapacity. (See pp. 89–90, *infra.*) Among the factors which caused and tended to perpetuate this maladjustment are the following:

A. Factors which brought about the opening of new mines.

1. The widespread ownership of coal resources far greater than were necessary to meet the demand at any one time, and the desire of each owner to cash in on the resources underlying his land regardless of what other land owners might be doing (Fg. 77, R. 148).

2. The pressure upon companies owning coal lands to open mines in order to meet taxes and carrying charges. (*Ibid.*)

3. Expansion of the railroads into new areas of undeveloped coal, permitting many new mines to be opened. (*Ibid:* Fg. 74, R. 145).

4. High prices in periods of shortage which have a powerful effect in causing inflation of capacity. Such runaway prices have been associated with war demands, traffic congestion, extraordinary exports, or major strikes. (Fg. 89, R. 157–8, 301, 535).

5. Shifts in market demand throwing business from one district to another—such as the change from beehive to by-product coking which transferred a considerable amount of business from the northern to the southern fields. (Fg. 77, R. 148).

6. Freight rate and wage differentials which encouraged the development of outlying producing districts. (*Ibid:* Fg. 74, R. 146).

7. Large scale strikes, or suspensions, causing consumers to seek other sources of

supply during the strike period. (Fg. 77, R. 148, 292).

B. Factors which led to expansion of capacity in excess of demand in mines already in operation.

1. Pressure to reduce such overhead cost items as those due to pumping water, repairing entries, supporting roofs, as well as taxes and other capital charges, which are relatively constant regardless of how much coal is produced. Even though coal must be sold below cost, nevertheless cost per ton may be reduced and loss thus minimized if production is increased by the continuous operation of a mine. (Fg. 61, R. 139).

2. The necessity of maintaining throughout the year capacity sufficient to meet the seasonal peak of demand each winter. (Fg. 57, R. 137).

3. Periodic increased demands in the non-unionized fields during the frequent large scale suspensions in the organized fields. (Fg. 77, R. 148).

4. High prices in periods of shortage. (R. 301).

C. Factors which prevented the closing down of excess capacity.

1. The high cost of closing down a mine. If the mine is to be reopened, water must be continually pumped, roofs supported, and taxes and other fixed charges paid. If the mine is not to be reopened, remaining resources are often lost, and all opportunity for a further return on initial investment aban-

doned. Operators often prefer to operate at a loss than to close down. (Fg. 60, R. 138).

2. The bankruptcy of a mine operator does not necessarily eliminate mine capacity from the market; another operator may take over the mine and, with previous capital charges removed, be able to operate it at a lower cost. (Fg. 62, R. 139).

D. Factors relating to demand.

1. Relative inelasticity of the demand for bituminous coal. Stopping a small percentage of what the market needs causes a violent increase in price. Offering more than the market needs seriously depresses the price. A decline in price does not bring about an equivalent increase in demand. (Fg. 57, R. 137, 328.)

2. Retardation in the growth of demand for bituminous coal because of (a) increased efficiency in the use of fuel, which has resulted since the war in a saving of fuel consumption per unit of production and of transportation of 20 to 30 per cent.; (b) changes in the fuel-consuming industries resulting from a shift to lighter products, requiring less fuel and from the substitution of scrap iron for virgin pig iron, which curtailed the amount of coal needed for coke; (c) competition with oil, gas and water power. (Fgs. 75, 76, 54, 55, R. 146–147, 135, 136.)

These factors did not result in any net decrease in the consumption of coal before 1929, although the percentage of the total

national energy supply attributable to coal fell considerably. (Def. Ex. 52, R. 1172.) Production between 1925 and 1929 was greater than in any previous five-year period.[1] (Def. Ex. 3–A, R. 1003.) The decline between 1929 and 1932 was, of course, largely due to the depression.

The combined effect of the factors listed above has been responsible in the past for a continuing maladjustment of supply to demand in the bituminous coal industry. In view of these factors and past experience it would seem to be extremely unlikely that this maladjustment will in the future be corrected in accordance with the orthodox theory of the normal self-adjustment between supply and demand. (Fg. 185, R. 212.) It is true that surplus capacity causes a decrease in the price of coal; but the lower prices do not increase the demand sufficiently to use up the excess capacity. It is true that the low prices may, in accordance with economic theory, cause the insolvency of the highest cost producers and eventually close down some mines; but the forced elimination by low prices of sufficient excess capacity to adjust supply to demand has been continually counteracted by increased pressure to expand the amount produced in each particular mine to reduce losses, and by the purchase and continued operation of bankrupt properties by new companies. (R. 417.) Although excess capacity might conceiv-

[1a] See note 1 *infra* p. 55.

ably be eliminated in time by this means, such a result would be possible, if at all, only after a great many years and the bankruptcy of a large portion of the industry,[1] accompanied by the premature abandonment of many mines and a grave waste of resources.

Labor Cost as a Competitive Factor.—Another factor which tends to explain the peculiar difficulties of the bituminous coal industry is the exceptional importance of labor costs in competition. In many fields, wages constitute over 60 percent of the total cost of production, and the remaining costs consist of items which offer little leeway for reductions. (R. 340, 441, 475.) The percentage of labor cost to value of the product is very much higher in the bituminous coal industry than in any other large industry excepting anthracite coal. Wages in the coal industries constituted in 1929 (the most recent year for which comparable figures are available) over 59 percent of the total value of the product at the mine, whereas the general average for the four other large mining industries was 21 percent and for the 48 largest manufacturing industries 18.2 percent. (Fg. 64, R. 140–141.) A table showing the unique proportion of wages to value of products in this industry, condensed from Def. Ex. 38, R. 1086 is given below.

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[1] When conditions were at their worst in 1932, the proportion of surplus capacity to production was greater than in any of the 10 preceding years. (Def. Ex. 3–A, R. 1003.) (See p. 61, *infra.*)

Comparison of the ratio of wages to value of products in coal mining and other industries, 1929 [a]

Industry and group	Per cent that wages paid were of value of products at mine or factory
Bituminous Coal Mining	59.5
Anthracite Coal Mining	59.8
Other Mining Industries:	
Iron ore	20.7
Copper	25.8
Limestone	33.4
Oil and gas	18.0
Average 4 largest industries	21.0
Manufacturing Industries:	
Boots and shoes	23.0
Bread and bakery products	18.0
Steam railroad repair shops [b]	49.8
Clothing, men's	19.9
Clothing, women's	14.3
Cotton goods	21.3
Electrical machinery, etc	19.8
Foundry and machine shops	25.0
Furniture	25.6
Steel works and rolling mills	20.5
Knit goods	23.4
Lumber and timber products	33.1
Meat packing, wholesale	4.8
Motor vehicle bodies and parts	23.8
Motor vehicles	9.8
Printing and publishing:	
Book and job	25.0
Newspaper and periodical	14.6
Average 48 largest manufacturing industries	18.2

[a] Details for these and other large industries are given in Def. Ex. 38, R. 1086. The manufacturing industries listed here are those paying over $150,000,000 in wages in 1929.

[b] Shops operated by railroad companies, not representative of manufacturing, since most of the work is repairs and involves very little raw material cost (R. 476, 477).

As a result of the high proportion of wages to total cost, the pressure of competition acts with particular force to cause wage reductions in the bituminous coal industry, and unless producers are bound either by collective agreement or by law not to cut wages, a progressive cutting of wages and a sweated exploitation of labor develops (*Ibid;* Fg. 182, R. 211, 477, 479).[1]

Under the competitive conditions which have existed in the bituminous coal industry for many years—conditions which the trial court said (R. 1192) might properly be called conditions of cut-throat competition—the incentive to cut prices is greatly increased whenever producers are free, as they are in the absence of collective bargaining, to cut wages. Under such conditions there is a constant beating down of the price and wage structure, and a situation of trade warfare results. Price-cuts following wage-cuts react upon producers in the same and other states, cause them to lose business, and make it necessary that they also cut their prices and wages. The record discloses that the industry has been operating under conditions of this sort since 1923. Their effect upon the financial position of the operators is evidenced by the income tax statistics (Fg. 102, R. 165). The impact of

[1] The court below found: "In the bituminous-coal industry cutting of wage rates is the predominant and most effective method of gaining competitive advantages and under the conditions which have existed in the industry has proven to be a destructive method of competition."

such conditions upon the employees was pointed out by the petitioner himself, who testified as follows (R. 278):

> I believe that fair and equitable wages should be established and I believe that representing as they do, more than 60% of the cost of producing coal, such establishment would exercise a stabilizing influence on the industry. * * *
>
> So far as labor is concerned I am sure there is a unanimity of feeling that the men and women employed by and dependent upon the industry should not be subjected to a lowering of their standards of living because of unrestrained play of economic forces. It seems obvious and unanswerable that some provision must be made for the protection of these workers, and it would seem that the best sort of protection which could be afforded them would be the maintenance, by statute, of maximum hours of labor and minimum rates of pay.
>
> That was my feeling and it is still my feeling, but at that time I did not know that the Congress of the United States did not have the power to do that.

HISTORICAL SURVEY OF THE INDUSTRY

THE PERIOD PRIOR TO 1923

The fifteen-year period prior to the world war was marked by a rapid and continuing growth of the consumptive demand for bituminous coal and this tended to diminish the cumulative effect of the economic factors above referred to which even at

that time were operating to expand the development of the country's coal resources beyond current needs (Fg. 77, 78, R. 148, 149). The force of competition had already exerted its potent pressure upon wage standards, and the workers had felt the necessity of collective action to protect their status. As early as 1898 wages were being fixed on a coordinated competitive basis by means of a collective interstate agreement covering most of the mines in Western Pennsylvania, Ohio, Indiana and Illinois, the so-called Central Competitive Field. The practical advantages in this industry of this method of standardizing wages over large competitive areas was recognized both by the employers and the mine workers and the area covered by such joint collective agreements expanded until in 1922 seventy per cent of the industry was operating under such agreements. (Fg. 106, R. 166, 340, 341, 428, 429.) Also as early as 1906 difficulty in negotiating such wage agreements began to be encountered by reason of the pressure on wage standards exerted by competition from operators whose wage rates were not stabilized by collective agreements. This pressure was the principal cause of several large scale "suspensions" which occurred in the pre-war years. (Fg. 80, R. 149.)

In 1916 there began a great increase in the demand for American coal for the manufacture of war materials. This increase plus the increased demand for many other commodities in the eastern manufacturing areas brought about a congestion of

railroad transportation and a shortage of coal cars at the mines (Fg. 83, R. 151). As a result spot prices for coal f. o. b. mine skyrocketed from $1.30 per ton in August, 1916, to $3.87 per ton in November and $4.18 in February, 1917.[1] (*Ibid.*)

After the United States entered the War in 1917, the demand for coal rose to an all-time maximum, and the resultant shortage and high prices caused the Government to fix the price and to undertake the control of distribution (Fg. 83, R. 151–152). Prices were finally adjusted under the Lever Act at an average mine realization of $2.58; and by March 1918 the Fuel Administration had been able to alleviate the shortage through a system of distribution control. (*Ib.*)

There followed a second acute shortage, extending from the last of October, 1919, to early in 1921. A large majority of the operators and their employees had been working under the terms of the 1916 collective bargaining agreement, as modified, which was to run for the duration of the war, but not beyond March 31, 1920. (Fg. 84, R. 152.) After the Armistice the mine workers, contending that the agreement had terminated, asked for

[1] Sales of coal are classified as "spot" or "contract." Most coal is sold under contracts running for a considerable period of time, the most common period being the "coal year" from April 1st to March 31st. Approximately 25 per cent of the total sales are made on the open "spot" market; prices in spot sales are much more sensitive to market changes and reflect such changes more immediately than the average price for all sales.

increased wages in order to meet the rising cost of living (R. 343). This request was refused by the operators, who claimed that the agreement would not expire until March 31, 1920. As a result of this disagreement a general strike of all union miners was called on November 1, 1919 (R. 343). Four hundred and fifteen thousand men were on strike in 22 states and coal shipments dropped from 13,000,000 tons in the last week before the strike to 3,500,000 tons (Fg. 84, R. 152, 302). By the sixth week available supplies of coal were used up, consumers' stocks were dangerously low, and industries were beginning to close for lack of fuel (Fg. 84, R. 152, 343). The Government acted to protect consumers by obtaining an injunction under the Lever Act (R. 430) and by reinstating the maximum prices and control of distribution authorized by that Act. (Fg. 87, R. 154, 155.) The President appointed a committee of arbitration which in April, 1920, made an award granting the men a 27 per cent increase in wages. (R. 344.) Maximum price limitations were retained in effect during the arbitration. When the limitation was lifted a runaway market ensued.[1] The maximum

[1] Before consumers could rebuild their customary stocks a railroad switchmen's strike created a shortage of coal cars at the mines (Fg. 84, R. 153). At the same time, the British Government placed a limitation on exports, thus creating an active demand for the export of American coal (*Ib.*).

price limitation in effect from November 1, 1919, to March 30, 1920, was $2.58 per ton. After the removal of the limitation the average spot price f. o. b. mine rose to the peak of $9.51 in August, 1920, and some sales as high as $20.00 a ton were reported (Fg. 84, R. 153). During this shortage, use was made of the powers of the Interstate Commerce Commission to insure the movement of coal to those persons and areas in greatest need (Fg. 87, R. 155).

The agreement reached through the arbitration of the 1920 strike ran with amendments until March 31, 1922. At that time the union operators refused to renew the agreement at the existing basic daily wage because of competition from operators who did not practice collective bargaining and were therefore free to cut prices by cutting wages. (Fg. 85, R. 153–154.) In the resulting suspension of work in the union mines, 460,000 bituminous miners went out. At the same time 142,000 anthracite miners went on strike (*Ib.*). The bituminous strike began April 1, 1922, and lasted officially until August 16, althought some districts remained out until September (*Ib.*). The effects of the strike were accentuated by a railway shopmen's strike in July, 1922, which created a shortage of coal cars in the non-union fields (*Ib.*). During this period there was another acute shortage of coal and average spot prices f.o.b. mines rose from $2.12 a ton in March, 1922, to

$6.13 in August (*Ib.*). The strike caused consumers to lay in abnormally large stocks in advance, to use coal not suited to their requirements and to pay excessive prices (Fg. 88, R. 156). Railroads suffered numerous locomotive failures due to inferior fuel (*Ib.*). The strike was threatening the entire industrial life of the nation. Efforts were made by the President to arrange a settlement; the priority powers of the Interstate Commerce Commission were again utilized, and a Presidential Fuel Distribution Committee was established (Fg. 87, R. 154–155). In September, 1922, Congress passed an act creating the office of Federal Fuel Administrator, and also established the United States Coal Commission to make a thorough investigation of the industry (Fg. 87, R. 155).[1] The strike was finally settled when many of the operators agreed to renew the 1920 wage scale, and the others quickly followed suit. (R. 344–345.)

The increased demand during the war and the high prices prevailing during the period of short-

[1] This Commission made a detailed study of conditions in the industry and reported its findings and recommendations to Congress in 1923. Among other findings and recommendations the Commission concluded that: (1) coal mining is an indispensable public service; (2) continuous fact-finding on the basis of compulsory submission of reports is advisable; (3) a Coal Division should be established in the Interstate Commerce Commission; (4) a Federal license should be required of shippers of coal in interstate commerce. (Report of the U. S. Coal Commission, pp. 259, 263, 264, 269.)

age permitted the industry to make large profits[1] and brought about a great increase in the number of mines and in mine capacity (Fg. 89, R. 157–158). The number of commercial mines increased from 5,726 in 1916 to 8,921 in 1920, and to 9,331 in 1923, and the calculated total mine capacity increased from 673,000,000 tons in 1916 to 796,000,000 in 1920 and to 970,000,000 in 1923—an increase of 44 per cent (*Ib.* Def. Ex. 3A, 4A, R. 1003, 1006). Production in 1923 had increased, however, only 12 per cent over that in 1916 (Fg. 89, R. 158).[2]

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[1] Profits in the bituminous coal industry during this period were as follows:

1917	$203,918,518
1918	148,846,632
1919	62,259,694
1920	249,367,379
1921	28,889,194

In 1922 and 1923, when no separate figures for bituminous and anthracite were available, the profits for both industries combined were $70,851,551 and $67,344,920, respectively (Fg. 102, R. 165).

[2] War, strikes, and the depression of 1921 made production during this period extremely irregular. It fluctuated as follows:

Year	Million tons	
1916	503	War.
1917	552	War.
1918	579	War.
1919	466	Strike.
1920	569	Strike aftermath, exports.
1921	416	Depression.
1922	422	Strike.
1923	565	Strike aftermath.

(Def. Ex. 3 and 3–A; R. 1002, 1003.)

THE PERIOD FROM 1923 TO 1929

The surplus capacity built up during the war and post-war period did not exert its full pressure upon the market until the middle of 1923, when the effect of the 1922 strike had run its course and an improvement in railroad service had eliminated car shortage as a factor limiting production (Fg. 92, R. 159). At the same time that this tremendous capacity sought a market outlet demand ceased to expand at its former rapid rate.[1] This combination of increased capacity and retarded demand greatly intensified the competition which had always characterized the industry, except in times of shortage. Pressure to cut prices reappeared in aggravated form. Accordingly there began after 1923 a period of price cutting warfare in the industry, which continued progressively until 1933. Price cuts soon exhausted the existing margin of profit, the majority of operators were selling at a loss, and future reductions in price could only be accomplished by wage cuts. A wave of price and wage reductions spread over the industry.

The initial cutting of wages and prices began in those fields of southern West Virginia and Kentucky where employers had persistently refused to

[1] In 1924 demand fell to 484,600,000 tons (Fg. 90, R. 158). Before the war demand had been doubling each decade (Pl. Ex. 21, R. 847). Although it continued to increase up to 1929, the growth was relatively slight (see p. 55, *infra*).

recognize the principle of collective bargaining.[2] It was competition from these fields that was the underlying cause of the refusal of the collective bargaining operators to renew the 1920 wage agreement which led to the strike of 1922 (Fg. 85; R. 153, 434). In the years following 1923, wage cutting in these fields again became a major disturbing factor. In February 1924 (Fg. 124, R. 184) the operators in the collective bargaining fields entered into a wage contract with their employees known as the Jacksonville agreement, which continued the existing daily wage rate ($7.50) for three more years. Following the execution of this agreement, operators in non-bargaining fields began to cut their wage rates (Fg. 124, R. 184, 345, 435). The pressure of these wage reductions fell most heavily upon the operators in adjacent collective bargaining fields and subjected them to ruinous competition. Under such conditions collective bargaining, which operated to impede wage cutting, had to be stricken down by these employers if they desired to maintain their economic existence. From the Kanawha Valley the area of non-union production spread northward and westward as companies which had signed the Jacksonville agreement found themselves unable to meet this competition and abrogated their wage

[2] In the countries south of the Kanawha Valley, operators had repelled all efforts to organize their employees, many of them using armed guards, yellow-dog contracts, evictions, and labor injunctions (Fg. 107, R. 167).

contracts (Fg. 108, R. 168). By the end of 1924 the practice of fixing wages by collective bargaining was banned from all fields south of the Ohio River excepting part of northern West Virginia which broke away early in 1925 (R. 435). Before the end of 1924 practically all operators in those fields were selling at much lower prices.

Between 1923 and the end of 1924 operators in the group of non-bargaining States—West Virginia, Virginia, and Kentucky referred to in Def. Ex. 31 A, R. 1078 A as Group "B"—reduced their average mine prices 78¢ [1] a ton, or 29.7% of their 1923 realization. (Fg. 122, R. 182.) Operators in the collective bargaining States—Pennsylvania, Ohio, Indiana, and Illinois referred to in said exhibit as Group "A"—attempted to meet these price cuts, but, being bound by collective wage agreements, succeeded in reducing their prices only 39¢ a ton or 14.9%. Group "B" prices had thus fallen 39¢ a ton more than Group "A" prices and, although Group "A" prices continued to drop, this differential was maintained in 1925. (Fg. 122, R. 182, Def. Ex. 31, 31A, R. 1077, 1078 A.)

The effect of this price differential on shipments in commerce was direct, immediate, and substantial. In 1923, 63.9 per cent of the total shipments

[1] The average sales realization per ton in the Group "A" States (Pennsylvania, Ohio, Illinois, and Indiana) in Defendant's Exhibit 31 was $2.62 in 1923, $2.23 in 1924, and $2.10 in 1925. In the Group "B" States (Kentucky, West Virginia, and Virginia), the average value per ton was $2.63 in 1923, $1.85 in 1924, and $1.72 in 1925.

from the seven states of Pennsylvania, Ohio, Indiana, Illinois, Kentucky, West Virginia, and Virginia had originated in the four Group "A" states. In two years the percentage coming from the Group "A" states shrank to 54.7 per cent. (Fg. 119, R. 180.) Although total national production decreased from 565,000,000 tons in 1923 to 520,000,000 tons in 1925 and production in the Group "A" states decreased 21.4 percent or 64,000,000 tons in this period, the production of the Group "B" states rose 15 per cent, or 26,000,000 tons.[1] (Def. Ex. 31, 31a, R. 1077, 1078A.)

A few illustrations of the many afforded by Defendant's Exhibits 24, 24a, 24b, 24c, 24d, 25, 26, 28, 28a, 29, 29a; 29b, 29c, 30, 30a, 31, 31a, 17, 18, and 19[2] will demonstrate how shipments in interstate commerce were affected by these differences in price. Between 1923 and 1925 shipments into Michigan from Western Pennsylvania shrank from 541,351 tons to 82,656 tons, and from Ohio to Michigan from

[1] The court below found that this diversion of commerce to the southern area was primarily due to the more rapid reduction of f. o. b. prices and not to expansion of capacity in the southern fields, though some part was due to quality. (F. 122, R. 182.) New development resulted in the production in the southern area gaining rapidly as compared with the northern area up until 1914 (F. 119, R. 180), but from 1914 to 1921, although southern capacity continued to grow with the expansion of the industry there was little change (1.3%) in the relative proportion between the two (*Ib.;* Def. Ex. 28, 28a, R. 1069–1070). After 1923 capacity declined in the southern fields as well as in the northern fields, though less rapidly. (F. 122, R. 182.)

[2] R. 1062–1078A, 1023–1025.

1,818,695 tons to 544,403 tons; while shipments to these areas from the more distant southern high volatile fields of West Virginia and Kentucky increased from 11,893,931 to 14,221,842 tons, and from the southern low volatile fields of West Virginia from 1,906,278 to 2,529,947 tons. (Def. Ex. 24b, R. 1064.) Shipments from the western Pennsylvania high volatile fields to Great Lake Ports for transshipment declined from 9,528,966 tons in 1923 to 2,479,083 tons in 1925 and from the Ohio high volatile fields from 5,941,938 tons to 1,450,230 tons; while shipments from the southern high volatile fields to Great Lake Ports increased from 8,262,571 tons to 16,321,178 tons. (Def. Ex. 24C, R. 1065.) Between these same dates shipments to Atlantic ports for transshipment either abroad or to other Atlantic ports from northern high volatile fields dropped 1,890,673 tons (from 6,329,266 to 4,438,593 tons) and from the northern low volatile fields 1,673,461 (from 11,313,821 to 9,640,360) tons; while shipments from southern high volatile fields increased 547,210 tons (from 3,697,724 to 4,244,934 tons) and from southern low volatile fields 2,663,-114 tons (from 12,159,194 to 14,822,308 tons). (Def. Ex. 24D, R. 1066.)

The economic pressure resulting from such great losses of business to producers in territories where collective wage agreements were not tolerated, and where wages and prices could therefore be reduced without limit, forced the collective bargaining operators to lower their prices to meet such competi-

tion; but as long as the producers who operated without collective bargaining were free to cut wages without restriction while their competitors were not, the latter could not regain their lost markets. The only alternative to economic destruction was a reduction in wages—and this could not be obtained without departing from the existing wage agreement. Before the end of 1924 certain producers who had signed the 1924 agreement found themselves forced to break it in order to preserve their economic existence. (Fg. 108, R. 168.) The miners resisted efforts to reduce wages to non-union levels, and a series of bitter local strikes resulted through northern West Virginia, Pennsylvania, and Ohio as these producers turned from union to non-union operations. Many of these strikes were prolonged, many mines were closed down and interstate commerce in coal was substantially affected (Fg. 108, R. 168, 169). As groups of these operators in the north cut their wage rates and their prices, the pressure upon their neighboring competitors became more intense with the result that before the expiration in 1927 of the existing wage agreement, very many operators in Pennsylvania, northern West Virginia, and Ohio had been forced at the cost of much violence, strife and bitterness to break their contracts and to abrogate the collective bargaining relationship which had so long existed between themselves and their employees.

As a result of this situation upon the expiration of the Jacksonville agreement on March 1, 1927, it

proved impossible to renew the interstate collective bargaining arrangement under which most of the industry had been operating for many years. A protracted and bitterly contested strike ensued. Although this strike caused no *national shortage* of coal, it did directly and substantially affect the distribution of coal in interstate commerce. (Fg. 108, R. 168, 169.) During the seven months period of the strike, production, and necessarily shipments in commerce decreased in Illinois 77.8%, as compared with 1926, in Indiana 45.9%, in Ohio 67.8%, and in Pennsylvania, which by that time had become mainly non-union, 14.1%. Kentucky production increased 19.2%. (United States Bureau of Mines, Coal in 1927, p. 333.)

The demoralizing nature of the forces brought into play by the sort of competition that has characterized this industry was strikingly illustrated during this struggle over collective bargaining in the period between 1924 and 1927. It was a life or death struggle and both sides were desperate.[1] (R. 385, 392.) The battle was not completely won by either side but after the 1927 strike the only important producing areas east of the Mississippi which continued to operate under collective bar-

[1] In 1928 the Senate Committee on Interstate Commerce investigated the conditions in the coal fields of Pennsylvania, Ohio, and West Virginia, connected with the strikes in those areas during the period 1924–1928. The testimony presented at this hearing describes in forceful detail the financial losses of the operators, the privation and sufferings endured by the mine workers, and many acts of brutality, violence, and repression.

gaining agreements were Illinois and a section of Indiana. (Fg. 109, R. 170.)

Following the break-down of collective bargaining in 1927, the southern operators, no longer having a competitive advantage over the northern operators in the matter of the absence of collective bargaining, were forced to a still further cutting of prices and wages in an attempt to retain the increased tonnage which they had won from the former collective bargaining states. But since the latter were no longer operating with fixed labor costs, they could now meet such competition. Accordingly between 1927 and 1929, prices and wages in both groups of states were progressively forced down, though more rapidly in the north than in the south.[1] The northern fields were thus able to recapture a portion of the markets lost in the previous years, but since they never completely caught up with the price reductions of the southern fields, the latter retained a large proportion of the gains formerly made. (Fg. 121, R. 181.)[2]

[1] Prices in the northern states declined from an average realization of $2.06 in 1927 to $1.78 in 1929, while prices in the south dropped from $1.73 to $1.55, narrowing the average differential in favor of the south from 33¢ to 23¢. (Def. Ex. 31, R. 1077.) Wages in the north declined from 86¢ average hourly earnings in 1926 to 70.7¢ in 1929, and in the south from 67¢ to 61.6, narrowing the differential from 19¢ to 9.1¢. (Def. Ex. 32A, R. 1079.)

[2] While the percentage of total shipments from the four northern states of the coal originating in the group referred to in footnote 1, p. 49, *supra*, had fallen from 63.9% in 1923 to 46.1% in 1927, it rose to 51.8% in 1929 [redacted]52.7% in 1930. (Fg. 119, R. 180.)

The above is a brief summary of the competitive situation in the industry between 1923 and 1929. During this period industry generally throughout the country was unusually prosperous, prices and wages were stable, and employment and payrolls were expanding. (Fg. 92, R. 159.) In the bituminous coal industry production was greater than for any other period in the history of the industry, being higher in *every* year from 1924 through 1929 than in any preceding year except the War years and the years 1920 and 1923. (Def. Ex. 3A, R. 1003.)[1] And yet the average sales realization, f. o. b. mine, declined almost without interruption[2] from $2.68 in 1923 to $2.20 in 1924, $2.04 in 1925, and ultimately to $1.78 in 1929—90¢ a ton or 33.6% below the 1923 level. (Fg. 96, R. 161; Def. Ex. 3A,

[1] The average annual production by five-year periods was as follows:

1910–1914	435,000,000 tons
1915–1919	508,000,000 tons
1920–1924	491,000,000 tons
1925–1929	529,000,000 tons

The period from 1915 to 1919 includes the abnormal war years of 1917 and 1918. The average for the other three years in this period was 470,000,000 tons. (Def. Ex. 3–A, R. 1003.)

[2] There was a temporary recovery of 2¢ a ton in 1926, which was an exceptional year. In that year the British coal strike shut down the British mines for nine months, greatly increasing the amount of American coal exported, and in addition, there was heavy purchasing in anticipation of the strike which it was accurately predicted would follow the termination of the Jacksonville agreement on March 31, 1927. (Fg. 97, R. 162.)

R. 1003.)[1] During the same period the average wholesale price for all commodities declined only 5.3%. (Fg. 100, R. 163–164.)[2]

While industry generally was showing large profits[3], the bituminous coal industry suffered heavy losses. In 1924 the bituminous and anthracite industries together reported to the Treasury a total net deficit of $49,250,562[4]; in 1925 the bi-

[1] The course of the decline was as follows:

1923	$2.68
1924	2.20
1925	2.04
1926	2.06
1927	1.99
1928	1.86
1929	1.78

(Def. Ex. 3A, R. 1003; Fg. 96, R. 161.)

[2] The wholesale commodity price index compiled by the Bureau of Labor Statistics includes transportation charges; the average f. o. b. mine realization price computed for coal by the Bureau of Mines does not include such charges. In view of the exceptionally high proportion of transportation charges in the coal industry, as compared to other industries, see p. 30, *supra*, the mine price (used in the text) would seem more strictly comparable than the delivered wholesale price for coal. But even on the latter basis (which includes the inflexible freight rate in the coal price) coal prices declined 19.5% between 1923 and 1929, as compared to the 5.3% drop for industry generally. (Fgs. 99–101, R. 162, 164.)

[3] Four other industrial groups out of 91 showed a net loss for the period 1925 through 1929. (Fg. 103, R. 165; Def. Exs. 49, 49A, R. 1166a, 561–563.)

[4] During the two years, 1924 and 1927, separate figures for bituminous were not available. It would seem clear that the largest part of the deficit in these years was attributable

tuminous industry reported a net deficit of $22,363,497; in 1926 bituminous and anthracite combined showed a profit of $37,714,000, and in 1927 a deficit of $20,303,000." In 1928 the bituminous industry lost $24,508,000; and in 1929 $11,304,000. The Carter Coal Company, itself, operating efficient mines with up-to-date machinery and plant, in the valuable smokeless coal area, lost large sums in every year of this period—ranging from $209,560, or 11.7¢ a ton in 1927, to $602,758, or 74.1¢ a ton in 1924. (Def. Ex. 47, R. 1163.) Many companies were forced into bankruptcy and receivership (Fg. 102, R. 165). Many mines were shut down or abandoned; the number of mines in operation declining from 9331 in 1923 to 6057 in 1929. (Fg. 93, R. 159–160; Def. Ex. 4A, R. 1006.) Many of these mines were abandoned before exhaustion, resulting in a considerable waste of coal resources. (Fg. 94, R. 160–161.)

Between 1923 and 1929, the computed wage payments in the industry dropped from $851,000,000 to $588,000,000, a decline of 30.9%. (Fg. 116a, R. 177–178; Def. Ex. 54, R. 1174–1175.) This decline

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to the bituminous industry, inasmuch as in 1925, 1928 and 1929 (the only years during this period for which separate figures for bituminous and anthracite were available) anthracite either broke even (in 1925 the loss was the insignificant figure of $44,359), or made a net profit—$5,251,000 in 1928, and $2,422,000 in 1929. As has been pointed out, note 2, p. 55, *supra*, 1926 was an exceptional year. (Fg. 102, R. 165.)

was brought about by the drastic wage reductions already referred to and by a large decrease in the number of persons employed in the industry. The number of men employed fell from 705,000 in 1923 to 594,000 in 1926 and in 1927, and to 503,000 in 1929. (Def. Ex. 4A, R. 1006.) This factor alone, with the accompanying increase in the average number of days worked per man per year from 179 to 219 days (*Ibid.*), might, standing alone, be regarded as a healthful sign of the elimination of excess workers from the payrolls in an over-expanded industry, with better conditions for those remaining employed. But during the same period wages were also falling rapidly. Between the Bureau of Labor Statistics survey the winter of 1921–1922,[1] and that in the winter of 1929, average hourly earnings (for miners and loaders, constituting the largest proportion of underground workers) for the nation as a whole fell 25.9%, from 84.5¢

[1] No survey of wage rates was made by the Bureau of Labor Statistics in 1923. (R. 468.) The surveys nearest to 1923 occurred in the period October 1921–February 1922, and in the fall of 1924. Between these two dates wage rates in the northern fields were substantially unchanged. (Fg. 124, R. 183; Def. Ex. 32A, R. 1079.) Wage rates in the southern non-union fields, however, increased if anything from 1921–1922 to 1923. (R. 469. "The southern rates of 1923 were relatively close to the northern rates.") After the signing of the Jacksonville wage agreement in February 1924, the southern rates declined markedly. (R. 469.) For these reasons the wage survey of 1921–22 is more representative of conditions in 1923 than is that of 1924.

per hour to 62.6¢ per hour. (Pl. Ex. 63, R. 926.) With the average number of days worked per year increasing, nevertheless average *annual* earnings for mine workers in the nation as a whole fell from $1,208 in 1923 to $1,169 in 1929. (Computed from Def. Ex. 54, R. 1174–1175.) Thus, while the employed miner worked on an average 40 days more per year, an increase of 22%, he received a smaller sum for his year's work.

Similarly, the decrease in capacity resulting from the shutting of many mines from 1923 to 1929 should have served to restore the industry to a sound economic position; but, even in the prosperous years of 1928 and 1929, after competition from most of the mines which closed down during the 1923–1929 period had been eliminated, the industry continued to lose money. (See Def. Exs. 3A, 4A, R. 1003, 1006.)

THE PERIOD SINCE 1929

With the competitive forces already described pressing on the industry before 1929, a complete collapse during the depression was inevitable. The cumulative effect of the slowing-down of all business added to the other factors affecting the growth of demand caused production to drop from 535,000,000 tons in 1929 to 310,000,000 tons in 1932. The loss of market outlets made competition much more intense, as each mine sought to

keep up its tonnage by cutting prices drastically and repeatedly. Loss of tonnage meant inability to pay fixed charges—and cutting of prices below all but actual out-of-pocket cash expenses became general. The producer making the largest cut in prices got the business; his coal rather than that of his competitors moved in interstate commerce. Inasmuch as labor costs were the only flexible cost item of consequence (see p. 37, *supra*), and since in most areas wages were no longer fixed by collective agreements placing operators on an even plane in this regard, operators reduced wages in order to make the necessary price cuts. (R. 347, 439.) It was not uncommon for an operator to obtain a contract by making an extremely low bid and then cut wages in order to fill it (R. 411, 348); from the viewpoint of his own interest and that of his employees, it seemed better to obtain work at lower wages than no work at all. But with all producers forced to adopt the same tactics the net result was that all had to keep cutting prices and wages, with ultimate benefit to none. (R. 347.)

As has been pointed out, the average price of coal had already fallen from $2.68 in 1923 to $1.78 in 1929. In 1930 the average sales realization dropped to $1.70; in 1931 to $1.54; in 1932 to $1.31, and in 1933 the average was $1.34. (Fg. 96, R. 161; Def. Ex. 3, 3A, R. 1002, 1003). The southern mines, at a greater distance from large consuming

markets and no longer able to cut labor costs more rapidly than their northern competitors, were forced to cut their prices to an average realization of $1.05 in 1932.[1] (Def. Ex. 31, R. 1077.)

During this period the coal industry as a whole was suffering very great losses. (R. 347, 382, 411.) In 1930 the deficit reported to the Treasury Department was $42,071,000; in 1931 $47,745,000; in 1932 $51,167,000, and in 1933 $47,549,000 (Fg. 102, R. 165).

Although many mines were abandoned and capacity shrank to 653,000,000 tons in 1932 and to 615,000,000 in 1933, the surplus capacity was greater in 1933 than in 1923. (Fg. 95, R. 161; Def. Ex. 3A, R. 1003.) In 1923 capacity was 73 percent in excess of production; in 1933, after production had begun to expand, it was 84 percent in excess (*Ib.*). In 1932 the excess was even greater, 110 percent (*Ib.*).

Wages declined even more drastically than prices. The total annual wage payments for 1933, computed at the rate prevailing before the N. R. A. Code, would have been $235,000,000, as contrasted with $588,000,000 in 1929, and $851,000,000 in 1923 (Def. Ex. 54, R. 1174–1175.) Average daily earnings for the mine workers in the nation as a whole

[1] Such an *average* realization means that a great deal of coal must have been sold to large consumers at prices well under $1.00.

declined to $3.36 in 1933 (Def. Ex. 54, R. 1174–1175).[1] Many mines in both northern and southern states were paying as low as $1.50 to $2.50 per day (Fg. 117, 147, R. 178, 198; Def. Ex. 33, 33A, 34, 34A, R. 1080A–1080D). Annual earnings per miner fell even more rapidly, as the average number of days' work per year dropped from 219 in 1929 to 160 in 1931, 146 in 1932, and 167 in 1933. (Def. Ex. 4A, R. 1006.) The calculated average annual income for 1933 at the rates in force before the N. R. A. Code for the average number of days worked in that year was $561 (computed from Def. Ex. 54, R. 1174–1175). Between 1929 and 1933 the annual income of the West Virginia loader had been reduced from $1233 to $557, and that of the

[1] In the leading coal producing states, the average daily wages for trackmen (the basic day wage occupation for skilled workers underground), and hand loaders (the principal piece-work occupation underground) were as follows: (Fg. 113, R. 174.)

	Average daily earnings in				
	Illinois	Ohio	Penna.	W. Va.	Kentucky
Trackmen:					
1929	$6.10	$5.16	$5.77	$4.82	$4.87
1933	4.97	3.14	3.40	3.06	2.96
Hand loaders:					
1929	7.03	4.61	4.88	4.99	4.77
1933	5.06	2.50	2.65	2.84	2.80

Pennsylvania loader from $1122 to $429 (Fg. 115, R. 176).[1]

With the collapse of collective bargaining on a national scale after 1927 uniformity in wage scales gradually disappeared even in the same fields and operators in the same fields were paying widely varying wages (Def. Exs. 33, 34, R. 1080A–1080D). In May 1933, the rates paid to trackmen at representative commercial mines varied as follows (Def. Ex. 33, 33A):

District	Number of mines paying daily rates of—					
	Under $1.50	$1.50 to $1.99	$2.00 to $2.49	$2.50 to $2.99	$3.00 to $3.49	$3.50 and over
Ohio				8	26	2
Western Pa.		4	46	31	54	18
Eastern Pa.			4	13	49	25
Northern W. Va.		2	6	51	7	1
Southern Sub.-Div. No. 2	2	16	55	51	28	9
Alabama	1	7	6	9		

In the Western Pennsylvania district, the rates paid ranged from $4.00 a day to less than $1.75.

[1] Calculated average annual earnings by states for trackmen and hand loaders was as follows (Fg. 115, R. 176):

	Calculated annual earnings in				
	Illinois	Ohio	Penna.	W. Va.	Kentucky
Trackmen:					
1929	$1,080	$1,037	$1,327	$1,191	$1,081
1933	701	531	551	600	563
Hand loaders:					
1929	1,244	927	1,122	1,233	1,059
1933	713	423	429	557	476

Under such conditions, the operator attempting to maintain a reasonable living wage was exposed to competition from wage cutting by other operators within the same field; and one wage cut forced another. Such competition in wage cutting within the limits of the same field tended to develop wherever the wage rate was not stabilized by collective bargaining (Fg. 117, R. 178–179).

Efforts to Improve Competitive Conditions and to Stabilize the Industry

Bituminous coal producers by themselves and in collaboration with Governors of the coal-producing states made various efforts to rescue the industry from economic disaster by voluntary and state action. In 1925, 1927 and 1929 producers in the relatively prosperous Smokeless Fields considered plans for cooperative action (Fg. 145, R. 195–196). In 1931 the Governor of Kentucky called a conference of governors of the coal-producing states and of the coal operators in an effort to stabilize conditions (*Ib.*). These conferences achieved no tangible results, the representatives of the producing states apparently feeling helpless in the face of a national problem. The Governor of West Virginia then asked the National Coal Association to consider the question. As a result a plan for the formation of voluntary regional selling agencies was proposed and Appalachian Coals, Inc., was formed. At that time many operators

hoped and believed that these selling agencies would stabilize the industry. No selling agencies went into operation until the middle of 1933, pending the decision of this Court in *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344. After that, Appalachian Coals, Inc., began operating and two additional agencies were set up in Ohio (Fg. 145, R. 196). But even in the short period of time during which these agencies functioned prior to the adoption of the Bituminous Coal Code under the National Industrial Recovery Act, it became apparent that they would be unable to protect their members against falling prices because of competition from non-member producers in the same and other areas.[1] Competition from outside producers clearly prevented any purely voluntary plan from correcting the chaotic and disorganized condition. (*Ibid.*)

[1] Leading producers, including those who suggested and supported the Appalachian sales agency plan, testified that it was unworkable. E. C. Mahan of Tennessee, Chairman of the Sub-Committee of the National Coal Association, from which came the suggestion which subsequently evolved into Appalachian Coals, Inc., testified with respect thereto as follows: "I saw that tried out and, in my opinion, it was unworkable." (R. 414.)

Ex-Senator C. W. Watson of West Virginia testified: "I do not think the selling agency formed under the Appalachian plan would have brought the industry out of the condition it was in, and kept it out." (R. 409.)

Chas. O'Neill of Pennsylvania testified: "The effect of the Appalachian Coals, Inc., so far as I could observe, was not the answer to the needs of this industry. The difficulties

During the same period from 1925 to 1932 while these attempts to stabilize the industry by voluntary or State action were being made, proposals for Federal regulation were being urged in Congress, as already indicated (*supra*, pp. 21–23). In 1932,

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that I had in my own district trying to get a sales agency organized made me feel that it could never become strongly enough organized in all the districts of the United States to effect the general situation." (R. 359.)

Harry O. Findlay, a member of the Appalachian Coals, Inc., and Chairman of the organization committee of Northern Coals, Inc., described the failure of efforts at stabilization through voluntary selling agencies as follows:

"After the Supreme Court decision in the Appalachian case an organization was set up covering the eight districts in that area and one also was set up in Ohio shortly after Appalachian was organized and a second one sometime after [fol. 478] that. Those three organizations are the only ones that I know of that have really functioned. My company was a member of Appalachian Coals, Incorporated, for our southern West Virginia property. I was chairman of the organization committee that set up Northern Coals, Incorporated, in Ohio, and was a director of that company after it was organized. We in the industry for the most part accepted that plan in the hope that we might be able to work something out of it of a practical nature and stabilize the industry. Appalachian Coals and Northern Coals did succeed in improving the methods of selling their coal and probably did considerable good in extending the distribution of their coal. They furnished combustion engineers to go out and help show the buyer how to use their coals (815). In ways like that they have been very beneficial, but as to stabilizing the industry they have been very ineffective for the reason that they were not able to get all of the producers in the respective districts into their organization. Those that remained out set the price for those that were in and they had competition from other districts that were not organized in any way. The net effect has been that it has been im-

especially, extended hearings were held.[1] With the passage of the National Industrial Recovery Act, discussion of special legislation for the coal industry was for the time being set aside, and proponents of Federal control attempted to work out a solution through a code of fair competition.

As the expiration of the National Industrial Recovery Act approached the industry was again confronted with the necessity of attempting to discover and apply remedial measures of some character.[2] The result of the representations made to Congress was the statute now before the Court. The record indicates a practically unanimous opinion on the part of the producer witnesses, labor witnesses and expert witnesses alike, that national regulation affords the only possible solution of an intolerable

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possible to maintain any fair price structure through those organizations, although, when they started, we were all hopeful that something of the kind might be developed and we would be able to get a price for coal which would enable us to do what we finally did under the code, pay our labor a reasonable wage and at least come out even on our sales. I have studied that situation very carefully and have been living with it for some time, and I am absolutely satisfied that there is no way in this industry that it can be stabilized without some effective Government force bringing about that stabilization. The industry just cannot do it itself." (R. 387–388.)

[1] Hearings on S. 2935, a bill to regulate interstate and foreign commerce in bituminous coal, etc. See list of hearings, footnote, p. 18, *supra*.

[2] The Bituminous Coal Conservation Act was introduced in both Houses in January, 1935. Committee hearings commenced the following month.

condition in one of our most vital basic industries. This conclusion appears from the record to have been confirmed by the experience under the operation of the National Recovery code. That code proved by experience to the satisfaction of the industry that, in spite of its complicated nature, price regulation and coordination of prices as between different producing areas in different markets was feasible and practicable. The results were beneficial to the producers and employees alike.[1] Increases in miners' wages and in operators' sales realizations were secured without reduction in volume of employment[2] or loss of markets to competing fuels. (Def. Ex. 52, R. 1172.) The maximum number of hours per day was reduced and miners' annual earnings were increased in some fields by

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[1] Petitioner himself testified (R. 277) as follows: "I testified before the Senate Committee when it was holding hearings on the present Act that: 'Those of us in the coal industry may differ as to the protection of the code. I believe that there is substantial agreement in the industry that the code has been of benefit to the coal industry, and that part which you played (addressing Senator Davis) and to which you have just referred in connection with the N. I. R. A. has been fruitful of results in the bituminous-coal industry.'

"That was in connection with an exchange between the Senator and me in which the Senator was seeking to imply that his interest in furthering the enactment of the NIRA had had in mind the coal industry and that I might be an ungrateful recipient of the favors that had accrued to me as a member of the industry."

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[2] The average number of men employed increased from 406,000 in 1932 to approximately 450,000 in 1934. (Def. Ex. 4A, R. 1006.)

as much as 50%.[1] At the same time returns for the principal fields indicated a sufficient margin over average total cost to enable the industry to operate at some return on investment.[2] Meanwhile, the interest of the general public was not sacrificed, as is indicated by the fact that the record discloses no complaint from consumers over price levels and the percentage contributed by coal to the total national supply of energy increased in comparison with oil and water power.[3]

[1] The working day agreed upon (at the place of duty underground) was 8 hours effective October 2, 1933, and 7 hours, effective April 1, 1934. The basic wage rates, in effect after April 1, 1934, were $5.00 a day for Illinois, Pennsylvania, and Ohio, and $4.60 for Southern West Virginia and Eastern Kentucky. (Fg. 147, R. 198.) At the rates prevailing before the code in early 1933, the average West Virginia trackman earned $3.06 a day, or $600 a year. At the code rate of $4.60, after April 1, 1934, he earned at the rate of $902 a year, an increase of 50 percent. (Working time in West Virginia was the same in 1934 as in 1933.) (Fg. 148, R. 198.)

[2] In Code Divisions I and II, which produce 89% of the national output, the results for the 10-month period April 1934 to January 1935, showed an average mine realization of $1.86 a ton, an average total cost, excluding interest on indebtedness, of $1.83, and an average margin (before interest) of 3¢ a ton. (Fg. 150, R. 199.)

[3] The percentages contributed by the various sources of energy in 1933 and 1934 were as follows:

	Anthracite	Bituminous Coal	Domestic Oil	Natural Gas	Imported Oil	Water Power	Grand Total
1933	7.0	45.2	28.1	8.7	1.0	10.0	100.0
1934	7.7	46.3	26.9	8.7	1.1	9.3	100.0

(Def. Ex. 52, R. 1172.)

PETITIONER'S REVIEW OF THE FACTS

Counsel for petitioner devote pages 22 to 62 of their brief to an "outline of the evidence" and review of the facts. This review consists largely of a legal argument as to the effect in law of the facts discussed. In this brief the legal effects of the facts in the record will be considered in later sections. Consequently, no detailed refutation will be attempted at this time of all of the conclusions presented in the petitioner's factual review, but it seems desirable to examine the methods of reasoning and the treatment of evidence by which some of the more important conclusions presented in that review have been reached. It is submitted that the results of such an examination are not such as to justify confidence in the correctness of these conclusions.

So far as the plaintiff's outline of the evidence presents conclusions of fact, the resulting picture is, it is submitted, not that disclosed by the record. Petitioner denies the existence of stoppages in and interruptions to interstate commerce, denies the presence of price fluctuations and instability, denies the abuse of wage-cutting as a competitive practice. We therefore proceed to consider his discussion of each of these topics as well as his conclusions on dislocations and diversions of interstate commerce in bituminous coal, on over-capacity and on conservation.

At page 61 of their brief counsel for petitioner arrive at an ultimate conclusion which they state in the following language: "In any event there have been no material interruptions or stoppages to commerce calling for the exercise of federal power."[1] In view of the record this is, indeed, a strange conclusion. We have already set forth in some detail the conditions attendant upon the great interruptions to commerce caused by the suspensions of 1919 and 1922 and will not repeat them here. Surely counsel do not contend that the situation which has the obvious and disastrous effects upon interstate commerce attendant upon the 1919 and 1922 suspensions does not give rise to or call for the exercise of federal power. Inasmuch, however, as counsel lay so much stress on the period since 1923 and pass over the effects upon commerce of the 1927 strike as of no consequence, it may be well to further review the facts.

The basic cause of the 1927 strike was unquestionably the cutthroat competitive price warfare

[1] Petitioner in his original brief served upon the respondents stated his ultimate conclusion relative to stoppages and interruptions in the language above quoted. After this portion of respondent's brief had been put in type, petitioner served a revised brief in which his ultimate conclusion on this point is stated thus (p. 61): "(7) There have been no material interruptions or stoppages in coal and no restraints or burdens upon its free movement or upon the free play of competition."

that was being carried on between the union and non-union fields (R. 346, 437). Counsel say that this strike could have had no substantial effect upon commerce because during the year 1927 the miners in the country as a whole lost only 45 days work on account of labor disputes, while the working days were more than average. Let us see what the record has to say about the actual effects upon commerce of this suspension. The record discloses that the 1927 suspension involved only approximately 169,000 men in 8 states. (R. 332.) But in the State of Illinois shipments fell from 10,000,000 tons a month before the suspension to a negligible quantity. Individual railroads serving Illinois and adjacent districts were similarly affected. Loadings on the Chicago, Milwaukee, St. Paul & Pacific Railroad, for example, dropped from 23,000 cars a month before the strike to approximately 2,900 cars a month during the strike. (R. 332.) During the 7 months of the strike shipments from Illinois averaged 78% below normal, and similar though less marked declines occurred in other states. At the same time the non-union fields to the south which were not affected by the suspension increased their tonnage, the State of Kentucky expanding its output 19.2% during this period (*supra,* p. 53). The net dislocation of business enforced by this suspension from the states affected by the stoppage to the non-bargaining states south of the Ohio River was approximately 15,000,000

tons. (R. 332, 333.) Counsel for petitioner apparently take the position that these facts constitute no interruption of commerce because whatever stoppages occurred in the commerce from certain states was made up for in amount by shipments from elsewhere or by the speeding up of production later. This is surely a novel test of the existence of a stoppage or interruption. But there are other incidents and results of the strike of 1927 which petitioner's brief does not mention at all.

Consumers of coal remembering the shortages attending earlier strikes, in self-defense, laid in enormous stocks of coal in anticipation of this suspension. A total stock of 75,000,000 tons was purchased, 40,000,000 tons in excess of normal requirements. (R. 333.) It is estimated that the working capital of consumers tied up in the extra 40,000,000 tons amounted to $200,000,000 and that the cost of the operation to consumers in interest charges and physical handling cost was approximately $20,000,000. (R. 333.) Accumulation of these stocks had begun in the summer of 1926 and it was an auxiliary cause of the sudden rise in spot prices of that year. The emergency stocks built up before the 1927 strike were not entirely consumed in the period of the suspension and the surplus continued to hang over the market for two years, exercising a depressing effect upon prices. (R. 333.) The diversion of orders during the suspension tended to encourage a temporary increase in capacity in the southern fields. (R. 335.)

Similar unsettling effects have attended other widespread suspensions of coal mining, even though no such general shortages as those of 1919, 1920, and 1922 were created. The suspensions of 1906, 1908, 1910, and 1912 all led to sudden and wide fluctuations in coal shipments and in the use of railroad transportation facilities, and to the accumulation of emergency stocks. Even when the price did not advance sharply, the consumer had to pay the cost of emergency storage, and if the excess stocks were not used during the strike, they acted to depress the market thereafter. The diversion of orders to new channels created an illusory anticipation of profits, led to ill-advised investments in new mines or new equipment, and was one of the factors tending to create or to perpetuate the surplus of mine capacity. (Fg. 111, R, 172, 333, 334.)

In 1928 and in 1932 the expiration of wage agreements in the few remaining collective bargaining areas was also marked by a suspension of work. (Fg. 134, R. 190, 463.) As in previous years, the existence of competitive areas where collective bargaining did not prevail, and where in consequence the producers were free to cut wage rates at any time, operated as a strong deterrent against renewal of the collective agreement in the still remaining areas of collective bargaining, since the producers in these areas naturally wished to be free to carry on the price warfare on the same terms

as their wage-cutting competitors. (Fg. 139, R. 192.) These stoppages are, in short, the inevitable result of the chronic prevalence of price war in an industry such as this, when carried on under conditions which leave some of the competitors free to adopt wage-cutting tactics while others are bound by collective agreements.

Opinions may, no doubt, differ as to the appropriate method for preventing in the future the stoppages of interstate commerce in bituminous coal, which have come to be chronic in the industry. Such opinions may well lie in the field of proper legislative discretion. But, in the face of the record, it seems impossible to understand how any one can reach the conclusion of petitioner's counsel that "there have been no material interruptions or stoppages to commerce." Of course, after these words, petitioner's counsel add the words "calling for the exercise of Federal power." Whether or not the material interruptions or stoppages shown by the record are such as to "call for the exercise of Federal power" is, of course, another question. If the words "call for" mean "important enough" or "material enough" to be a proper subject of governmental concern, the record clearly indicates an affirmative answer. If, on the other hand, "call for" means sufficient in law to afford a justification for governmental action, then the answer involves a legal question of *due process* which obviously can not be supplied

by the facts alone, but which requires such a discussion of the law of *due process* as is contained in later sections of this brief. Similarly, if the words "call for the exercise of federal power" are meant to raise the question of whether there is a constitutional basis for Federal as distinct from State action, again a question of law is presented which can not be answered from the facts alone, but which requires a discussion of the commerce power of the Federal Government in the light of the fact situation presented by the record. This legal issue is later discussed (*infra,* pp. 118 ff., 238 ff.)

If on the face of the record it is impossible to deny, as petitioner denies, the chronic occurrence of stoppages and interruptions to interstate commerce in the bituminous coal industry, it may of course be contended that these stoppages are due to the existence of labor organizations and the practice of collective bargaining in the industry which the statute at issue is designed to protect. Petitioner apparently refrains from making such a contention. So far as concerns past experience, the answer to it is obvious. The stoppages and interruptions have been due not to the existence or nonexistence of collective bargaining but in large part to the prevalence of price cutting warfare in an industry where competitive areas exist side by side in some of which collective bargaining has prevailed and in others not. The pressure of price cutting from the areas without collective bargaining on the producers in collective bargaining areas has been

such as to operate as a constant incentive to the latter to break their collective agreements or to refuse to renew them. Strikes and interruptions of commerce in these areas have been the result. On the other hand, in order to remove this incentive there has been a constant effort by labor to extend collective bargaining into the areas where it did not previously exist. As a result, strikes and interruptions to commerce have taken place in these areas also. The existence side by side of areas with collective bargaining and areas without, inevitably and necessarily, in an industry like the bituminous coal industry, holds out a constant threat of stoppages and interruptions which has chronically been translated into actuality. Quite independently of the provisions of the statute which sanction the right of collective bargaining, the elimination of price cutting warfare is a legitimate and appropriate means of diminishing the incentive to such interruptions, since in the absence of such warfare the pressure for competitive wage cutting would be greatly reduced if not altogether removed.

PRICE FLUCTUATIONS AND DECLINES

Petitioner ignores the effect on commerce of the steady decline in the price of bituminous coal since 1923, and belittles the existence of price fluctuations. It is admitted by all that there were violent fluctuations in prices during the period of shortage from 1916 to 1922, the average spot price ranging from $1.21 to $9.51 a ton. (Def. Ex. 5, R. 1007.)

In insisting that there have been no *violent fluctuations* in price since 1923 (Br. 35, 36), petitioner overlooks the severity and abruptness of the price *decreases* during that period. The increases in spot prices, which in periods of shortage at times amounted to 450 per cent in certain fields,[1] are easy to picture arithmetically and graphically. On the other hand, it is not arithmetically possible for a decrease to reach any such figure as 450 per cent, or even 100 per cent. Long before any spectacular percentage of decrease is reached, however, it is possible for the decrease to be carried below production costs and so, when characteristic of an entire basic industry, to become a proper cause for governmental concern. As has been demonstrated elsewhere in this brief, with the exception of the code year 1934, prices in the bituminous coal industry as a whole have been below production costs continuously since 1923, with the possible exception of a single year (Fg. 102, R. 165).

EVIDENCE RELATING TO WAGE LEVELS

Petitioner attempts to refute the evidence that wage-cutting brought about serious reduction of miners' earnings from 1923 to 1933, by a series of statistical comparisons of such doubtful validity as to be, in several instances, entirely misleading. We shall consider seven points.

1. *Trend of Typical Wages.*—In the first place, in commenting on the decline of daily wages during

[1] In August, 1920, the price of Pocahontas coal, f. o. b. mines, was $12.90 a ton (R. 303).

the depression (Br. 55), petitioner mentions only the State of Illinois, in which the wage rate was supported by collective bargaining throughout the entire period. In the four other largest States, daily wages declined substantially more than in Illinois during the period 1922 to 1933, as is shown by Finding 113, (R. 174) which is based upon petitioner's own exhibits. (Pl. Ex. 82B, R. 985.)

2. *Relative Decline of Coal Mine and Other Wages.*—In comparing the rate of decline in coal mining with that in other industries (Br. 57), petitioner matches the trend of *daily wage rates* in Illinois mines with *weekly earnings* in Illinois manufacturing plants, from 1923 to 1933. This makes no allowance for the irregular employment characteristic of mining, and the fact that daily wages are accordingly no measure of weekly earnings. If petitioner will compare the trend of miners' *earnings* (as indicated by his own Exhibit 82B on an annual basis) with the decline in factory workers' *earnings,* for the same years, he will find that the miner suffered a substantially greater reduction.

	1923	1933	Percent decline
Illinois miners' *earnings* (trackmen, per year)	[a] $1,185	[b] $701	−40.8%
Illinois factory workers' earnings (all wage earners, including women, per week)	[c] $27.07	$18.28	−32.5%

[a] Finding 112, R. 173. [b] Finding 115. [c] Record, p. 402.

Petitioner states (page 57) that the decline in "real wages" for labor in all manufacturing indus-

tries from 1923 to 1933 was much greater than in mining. How slender a basis there is for such a statement is shown by comparing the total sum paid out in wages in manufacturing with that in mining:

	1923	1929	1933	Percent decline, 1923-33
Total wage payments:				
In manufacturing	[a] $11,009,298,000	$11,620,973,000	$5,261,576,000	−52.1%
In bituminous coal mining	[b] $851,000,000	$588,000,000	$235,000,000	−72.4%

[a] U. S. Bureau of the Census, Census of Manufactures, 1931, p. 20; 1933, Summary by Industries, p. 1.

[b] Defendant's Exhibit 54, R., p. 1174-1175.

From 1923 to 1929 the manufacturing industries of the country were expanding their payrolls. But during this period of general prosperity the annual payroll of the bituminous coal mines fell from $851,000,000 to $588,000,000. Over the decade 1923 to 1933 manufacturing payrolls declined 52.2% and coal mining payrolls declined 72.4%.

3. *Comparative Level of Coal Mine and Other Wages.*—In comparing the level of miners' wages with that in other industries (p. 57), petitioner matches average hourly *earnings* of "outside laborers" with average hourly *entrance rates* for common labor in other industries. His comparison is based upon Def. Ex. 53, R. 1173, which was supplied by the U. S. Bureau of Labor Statistics. He fails, however, to note the Bureau's warning that (R. 1173) "in any comparison of hourly wage rates such as those shown here, the intermittent

employment characteristic of bituminous coal mining should also be kept in mind" and that at the time covered by the comparison bituminous coal employees received 20 percent to 33 percent less work than manufacturing employees. (R. 1173). If petitioner were to allow for the irregular employment, he would find that the mine laborer's actual earnings per week were substantially less than those of the laborers in other industries in seven of the nine States shown. The comparison leaves no doubt that before the coming of the N. R. A. Code, the earnings of bituminous coal miners had been beaten down to very low levels.

4. *Accident Hazard and the Wage Rate.*—In commenting upon the adequacy of miners' earnings, petitioner omits all reference to the accident hazard in mining. In 1934 the accident frequency rate in bituminous mines was 2.9 times as great as the average for all industries and the accident severity rate was 6.7 times the average for all industries. The severity rate in bituminous mines was higher than in any other industry reporting to the National Safety Council. The actuarial chance is that one out of ten men who spend their working lives in the mines will be killed in a mine accident (Fg. 66, R. 142).

(5) *Coal Mine Wages and the Cost of Living.*—In comparing the decline of miners' earnings with the "cost of living" (Br. 56), petitioner makes use of the wholesale price index of all commodities.

This index, consisting largely of raw materials, industrial products, and agricultural staples quoted in central markets, is not a trustworthy measure of the cost of living. A miner's family does not buy steel billets and pig lead.

The fair yardstick for such a comparison is the official index of the cost of living, as calculated by the U. S. Bureau of Labor Statistics, which yields the following result:

	1926	1933	Percent decline
Cost of living index [a] (1913=100.0)	178.7	132.2	−25.9%
Miners' earnings (trackmen) [b]:			
Illinois, per day	$7.60	$4.97	−34.6%
Kentucky, per day	$4.84	$2.96	−38.8%
Illinois, per year	$1,307	$701	−46.4%
Kentucky, per year	$1,113	$503	−54.8%

[a] U. S. Bureau of Labor Statistics. Serial No. 329, *Changes in Cost of Living*, Oct. 15, 1935, p. 6. The figures used are the averages for June and December.

[b] Findings 113 and 115, R. 173, 175, based on petitioner's Exhibit 82B.

It is clear that, contrary to petitioner's contention, the wages of both the northern and the southern mine worker declined much more than did the cost of living.

(6) *Northern and Southern Wages Contrasted.*—Petitioner's brief gives a table (Br. 55) purporting to compare the wages of Kentucky trackmen and Illinois trackmen, but some of the figures used are not quoted from the findings allegedly cited, nor can they be derived from the findings without assumptions contrary to fact.[1]

[1] For example, in computing the Kentucky trackman's earnings in 1923, petitioner's brief has apparently assumed that wage rates in 1923 would be equal to the average for

It was quite unnecessary to construct this table, for more complete and entirely comparable data had been introduced by petitioner himself in Pl. Ex. 82B. (R. 985.) These data were correctly summarized by the trial court in Findings 113 and 115 (R. 174, 176) from which the following comparison is taken, using all of the years shown by the record:

	1922	1924	1926	1929	1931	1933
Daily earnings [a]:						
Illinois trackmen	$7.62	$7.49	$7.60	$6.10	$6.12	$4.97
Kentucky trackmen	5.94	5.22	4.84	4.87	4.46	2.96
Kentucky under Illinois	−$1.68	−$2.27	−$2.76	−$1.23	−$1.66	−$2.01
Annual earnings [b]:						
Illinois trackmen	$914	$1,109	$1,307	$1,080	$832	$701
Kentucky trackmen	832	908	1,113	1,081	709	503
Kentucky under Illinois	−$82	−$201	−$194	+$1	−$123	−$198

[a] From Finding 113, R. 174. [b] From Finding 115, R. 176.

Petitioner admits that Kentucky mines had been taking business from Illinois mines by reducing wages. The record shows that daily earnings of trackmen ran consistently lower in Kentucky than in Illinois and that after the Illinois union scale was reduced, in an attempt to meet non-union competition, Kentucky rates were cut still further.

The disparity in rates between the districts was greatest in 1924 and 1926 during the period of the

1922 and 1924. It is known, however, that nonunion wages were generally maintained at comparatively high levels in 1923, and that the cutting in wages came in 1924 after the signing of the Jacksonville agreement. (Fg. 124, R. 183–184, 469.)

Jacksonville wage agreement. The record shows also (Fg. 113, 114, R. 175) that by cutting their wages during this period Kentucky operators were enabled to run their mines more steadily than the Illinois mines and to offer their employees more days of work. But the record also shows conclusively that the steadier working time of the non-union miner was sufficient to offset his lower wage rate in only one year out of the six years shown (his income exceeding that of the Illinois miner by $1 in the year 1929). In all the other years, his annual income was much below that of the Illinois miner. At the beginning of the period the Kentucky worker was $82 below and at the end of the period $198 below.

This comparison of the two northern and southern groups selected by petitioner for analysis brings out clearly the ultimate effects upon the mine workers of competitive wage cutting. For a time the ability to undercut the collective-bargaining scale seemed to work to the non-union miner's advantage, but as collective bargaining broke down, and more and more fields went non-union, the entire wage structure crumbled. The net result was to drive all wages down and to more than destroy the temporary advantage gained by the non-union worker. In the end, the Kentucky miner's daily wage had been cut 50 per cent and his annual income had fallen to $503.

(7) *Evidence of Relief Rolls.*—Perhaps the best commentary on petitioner's contention that the position of mine labor was not unduly depressed is afforded by the burden of relief during the depression. Existence of an exceptional need for relief in the bituminous coal area was early recognized and in 1931, two years before the Federal Government accepted general responsibility for relief, President Hoover requested the American Friends Service Committee to undertake child feeding in the coal fields (R. 503).

Under the Federal Emergency Relief program also the relief load was found to be exceptionally heavy in the coal fields. A recent study by the University of Pennsylvania shows that out of 163 of the leading manufacturing counties in the United States there was one county in which 24% or more of the population was on relief during the year July 1933 to July 1934. Out of 41 other important urban counties in the United States there was also one with more than 24% of the population on relief. But out of the 88 counties classified as chiefly engaged in mining bituminous coal there were 22 counties in which over 24% of the population was on relief.[1]

[1] Goodrich, Allin, and Hayes, Migration and Planes of Living, Bulletin No. 2, Study of Population Redistribution, University of Pennsylvania, 1935, pp. 89–106.

The counties classified as dominantly coal-mining include all those in which 20% or more of the working population was engaged in producing bituminous coal.

DIVERSION AND DISLOCATIONS OF INTERSTATE COMMERCE

Petitioner admits the fact of shifts in tonnage from fields in certain states to those in other states and back again, brought about by under-cutting of prices with attendant cutting of wage rates, but proceeds to make the legal argument that such diversions of commerce lie beyond the power of Congress to mitigate by regulation, because such regulation would amount to preventing one state or area from obtaining a competitive advantage that it did not theretofore have over another state or area in a common market. This argument either denies to Congress the power to regulate competition in interstate commerce altogether, or else amounts to an argument that the kind of regulation in question would be an unreasonable and hence invalid regulation since it would interfere arbitrarily with reasonable and proper competition. The power of Congress to regulate competition in interstate commerce has never, so far as we know, been questioned until this case, and will be discussed at length in later sections of this brief. The question therefore remains as to the reasonableness or propriety of the kind of competition here involved. Petitioner apparently takes the position that since the volume of commerce may ebb and flow from state to state as a result of proper and legitimate competition, any kind of competition which produces such ebb and flow is proper and legitimate.

The shifts in the proportion of the volume of bituminous coal in interstate commerce contributed from time to time by the different states and areas prior to the war period may well have been, and probably were, the results of competition quite unlike the fierce price cutting and wage cutting warfare since 1923. There is nothing in the Act which would prevent, as petitioner seems to suggest, a decline in the proportionate production of a state like Maryland, extending over a century and resulting from wholly natural causes. That the objective of the Act is not, and that its natural effect will not be, to freeze production, will be argued in the course of the discussion of the law at a later point in this brief (pp. 172 ff.). From the standpoint of the facts it is sufficient to point out that there is a distinction which it is competent for the legislative body to recognize between reasonable and socially advantageous competition on the one hand and destructive price cutting warfare on the other. It has been recognized in the decisions under the anti-trust laws and in specific provisions of these laws themselves. Petitioner makes no effort, except by assumption, to support his identification of the type of competition which has gone on in the bituminous coal fields since 1923, and produced the results apparent in the record, with the competition which because of its reasonable and beneficial character may conceivably be protected by the Constitution from governmental regulation. He simply assumes the point to be proved.

OVERCAPACITY

Petitioner contends that overcapacity will be accentuated rather than alleviated by the Bituminous Coal Conservation Act and would make it appear that overcapacity is the sole cause of all the evils in the industry. (Br. 46). Thus on pages 24–25, it is contended that the intense competition results *from* excess capacity and results *in* low prices and low wages. This analysis over-simplifies a complicated mass of interacting causes and effects. Every witness interrogated on this point agreed that the bituminous coal industry has a large surplus of capacity and agreed that the presence of excess capacity was one of the principal difficulties of the industry. But they also specified other major factors making for its continued instability. The witness Tryon (R. 328) referred to the inelasticity of coal demand and the fact that labor constitutes 65 percent of the costs of production. The witness Lubin stated, "The situation is the result of a series of causes," and mentioned first overcapacity and also the unique proportion which wages constitute of cost and the high cost of shutting down a mine. (R. 476–477.) These and the other factors referred to on pages 32–40 *supra* were also emphasized by other witnesses. Overcapacity is a result as well as a cause of instability.

But in any event petitioner's argument that if the Act results in an increase in price, it will aggravate and increase the condition of over-capacity is unsound. It would tend to have that effect only

if the amount of price increase should increase the margin above cost, and the Act takes cost for its standard. It is not price in itself, but the margin of profit between price and cost which measures the incentive to increase capacity. (R. 327.) The evidence shows that a slight increase in capacity had occurred under the N. R. A. Code (R. 327). It was estimated that a profit margin of 5¢ a ton might cause an increase of 5% in capacity by the end of two years (R. 327, 328); and that minimum prices equal to the average cost of production but not in excess thereof, in the manner contemplated by the Act, would not result in any increase in capacity (R. 351).

To deal with the problem of inflation of capacity, it is necessary to get at the causes of the expansion of capacity. Forty years of unregulated competition have failed to bring about a balance between capacity and demand. The period of intense competition after 1923 did force a heavy liquidation of capacity. Yet the degree of excess was greater in 1929 than it had been in 1913 (Defendant's Ex. 3, 3A, R. 1002, 1003) and the further declines in capacity from 1929 to 1933 were more than offset by the decline of demand associated with the depression. (Fg. 95, R. 161.)

On the other hand the Act before the court should tend to remove three of the causes of capacity inflation—(1) violent increases in price in times of shortage, (2) large-scale strikes cutting

off the interstate commerce of one part of the industry and concentrating demand upon another part (R. 292–293), and (3) disparate wage costs causing diversion of interstate commerce from one field to another. The maximum price provisions of the Act are intended to prevent a run-away market in times of shortage. It was primarily such run-away prices that caused the huge increase of capacity from 1917 to 1923 (R. 301, 535.) If the Act succeeds in minimizing strikes and in adjusting wage differentials so as to maintain a reasonable equality of opportunity between producing areas in interstate commerce, the effects of the last two factors making for inflation will likewise be reduced.

COAL RESOURCES AND CONSERVATION

The facts cited by petitioner as to the life of coal resources (Br., p. 60) omit all reference to the evidence introduced as to the short life of some of our finest coals, the avoidable losses in mining under present practice, and the influence of unrestrained competition in causing such loss. Dr. George H. Ashley, the State Geologist of Pennsylvania, testified that the Connellsville coking coal would be exhausted in thirty years; and the Pittsburgh bed in the State of Pennsylvania, in one hundred years (R. 533). At 1929 rates of production, the beds of present minable thickness and quality in the Pocahontas and New River districts of West Virginia have a life of eighty-five years (Fg. 160, R.

204, 323, 531). The average loss in mining of all bituminous coal is thirty-five percent, of which twenty percent is classed as avoidable. In a year of normal production, the avoidable loss is 150,000,000 tons (Fg. 162, R. 205, 533).

Petitioner contends that the present Act has no relation to the conservation of resources other than the provision directing the Commission to make a study of the subject. (Br., p. 60.) He makes no reference to the findings of the Mineral Policy Committee of the National Resources Board. (Def. Ex. 43B; R. 1137–1149.) This Committee reports that "the causes of the excessive waste attending the mining of our coals are complex, but the great underlying cause is destructive competition." (R. 1142.) Prevention of the readily avoidable losses "depends on relieving the conditions of poverty which have surrounded the industry. The members of this Committee who have given most thought to the question are convinced that *the necessary first step in reducing the waste of coal in mining is to aid the industry in establishing itself on a stable and profitable basis.* * * * (Italics supplied.)

"In time, if the industry can be placed on a stable basis and competition between districts held within reasonable bounds, the legislatures of the coal-mining States may be expected to enact conservation laws to lessen the waste of their resources analogous to those already adopted in some juris-

dictions for oil and gas. Hitherto, State action has been impossible because of cut-throat competition. Progress in this direction can go no faster than development of a strong opinion within the principal coal States. Meantime, the first and indispensable step is so to organize the economic forces of the industry as to relieve the extreme pressure of competition" (R. 1143).[1] The members of the Mineral Policy Committee included a group of distinguished geologists, mining engineers, economists, and advocates of conservation.

Doctor Ashley testified (R. 536), "The State of Pennsylvania cannot take any measure to prevent this cut-throat competition. I believe * * * fixing a minimum price would help to prevent the waste of coal in mining."

SUMMARY OF ARGUMENT

In view of the detailed nature of the index of Argument at the beginning of this Brief it is believed that a Summary of Argument is not necessary.

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[1] The report of the Planning Committee on Mineral Policy, National Resources Board, *Report on National Planning and Public Works*, December 1, 1934, page 402. See Def. Ex. 43B, R. 1142, 1143.

ARGUMENT

Introduction

The Government contends that petitioner was correctly denied the relief which he sought below and supports this contention on the ground (1) that the various provisions of the Bituminous Coal Conservation Act severally constitute valid exercises by the Congress of the power to regulate interstate commerce duly conferred upon it by the Constitution and (2) that in so far as any particular provision or provisions might be found to transcend such power, the Act as a whole, since its provisions are expressly declared to be separable, is not thereby invalidated, and the petitioner may be constitutionally required to comply with the provisions established to be within Federal power.

The argument of the Government, therefore, requires an examination and analysis of the various provisions of the Act in their relation to the power conferred upon the Congress by the Constitution and in relation to the prohibitions or limitations imposed by the Constitution upon the exercise of that power.

Petitioner's counsel in their brief adopt a radically different approach. They attack the statute as a whole on the basis of its supposed ends and purposes before applying the test of constitutionality to particular provisions and they thereby seek to deduce the invalidity of those provisions mainly from such denunciation of the Act as a whole.

Accordingly their argument relies largely upon broad characterizations of the entire Act and upon suggestions and innuendoes designed to discredit the purposes and economic policies supposed to have actuated the legislative body in enacting it. Thus the object of the Act is said to be to subject an industry to Federal regulation (Br. p. 2), to regulate production (Br. p. 10), to effect "stabilization" (Br. p. 82), to set up a "planned economy" with economists doing the planning (Br. p. 59), to "unload the troubles of the coal industry on the Federal Government" (Br. p. 59), to establish Federal control of economic life (Br. p. 140), to promote the interests of coal operators and miners by increasing their share of the national income (Br. p. 96).

Such characterizations of supposed objects, purposes, and results are put forward as if they were in themselves the established criteria of constitutional power rather than mere argumentative assumptions as to ultimate legislative policy. It may well be that some or all of these supposed objectives, if accepted as constituting the legislative purpose of Congress, may be regarded as unwise in point of policy, or economically unsound. Many familiar types of existing legislation, however, may be branded by those not in sympathy with them with equally hostile descriptions of purpose. Thus a progressive income tax may be described as designed to effect a redistribution of wealth. A protective tariff act may be described as designed

to control economic life, divert the direction of economic enterprise, and promote the interests of manufacturers and employees engaged in certain lines of industry by increasing their income at the expense of the rest of the community. An act establishing for employees of interstate railroads the right of collective bargaining may be described as an act for the promotion of trade-unionism and the restriction of freedom of contract.

To urge uncomplimentary epithets as a test of constitutionality is to make legislative power dependent wholly on opinion as to the soundness or unsoundness of legislative policy. It is submitted that the question of the object or purpose of a legislative enactment of Congress becomes pertinent on the point of constitutionality only in connection with some specific question as to the extent and scope of a particular power granted to Congress on which a statutory provision depends for support, or in connection with the content and meaning of some specific limitation imposed by the Constitution on the exercise of such a power. Accordingly, supposedly distasteful objectives harbored by Congress should not, it is submitted, be exploited to create general impressions as to the unconstitutionality of a statute as a whole from which to deduce arguments as to the unconstitutionality of particular provisions.

There is a second preliminary matter to which attention should be called before proceeding to examine the constitutionality of the various provi-

sions of the statute. This is petitioner's misconception of the purpose for which evidence was introduced below concerning the facts and conditions of the bituminous coal industry and as to the bearing of this evidence upon the constitutional issues here involved. Petitioner apparently takes the position that the burden of establishing constitutionality rests upon the Government and states that the Government assumed this burden and introduced evidence of economic facts "for the avowed purpose of bringing the Act within the provisions of the Commerce Clause". (Br. p. 6.)

It is well established that the burden is upon one who asserts the unconstitutionality of a legislative enactment. This burden, of course, need not necessarily require the introduction of evidence, but may on occasion be satisfied by appeal to the doctrine of judicial notice. When petitioner claims, as he does, that the Bituminous Coal Conservation Act is invalid on its face (Br. p. 22), he obviously relies on judicial notice, for the meaning and effect of many of the provisions of the statute can obviously not be understood save by reference to the situation to which the statute applies. For example, the question of whether a transaction is or is not in interstate commerce or does or does not directly affect interstate commerce depends on facts *dehors* the statute. *A fortiori* is this true on the issue of whether or not restrictions on freedom of contract encounter the constitutional barrier of due process.

The determination of this issue turns on the reasonableness or appropriateness of the restriction, and questions of reasonableness require illumination from facts. The Government has introduced the volume of evidence regarding the facts and conditions of the bituminous coal industry, not for the purpose of sustaining the burden of establishing the constitutionality of the statute against an initial presumption of unconstitutionality, but for the purpose of making available to this Court the information which will enable it to pass upon the reasonableness and appropriateness of the exercises of Congressional power here involved.

In this connection, petitioner apparently seeks to suggest some possible vice in the facts which the Government has introduced into the record by calling them "economic" facts, placing the phrase in quotation marks (Br. pp. 22, 28) and elsewhere referring to them as "so-called 'economic facts' " (p. 86). The Government does not insist upon the adjective. It does not seek by means of a word to attach any greater significance to the facts than they otherwise would have. It does insist, however, that in a case presenting the constitutional issues here involved, the facts *are* important and that they are not rendered less important because they deal with matters of trade and commerce which inevitably lie within the realm of the "economic", however distasteful petitioner may find that word.

I. The Tax

THE TAX IMPOSED BY THE ACT IS CONSTITUTIONAL IF THE REGULATORY PROVISIONS OF THE ACT ARE CONSTITUTIONAL

The Government has not contended at any stage of this litigation that the validity of the tax imposed by Section 3 of the Bituminous Coal Conservation Act could be supported on any other basis than the power of Congress to regulate commerce among the several States. The Government concedes that if the regulatory provisions of the Act are not valid under the commerce clause, the fifteen percent tax imposed on producers who operate otherwise than under the code cannot stand separately under the taxing power. But if the regulatory provisions may be imposed under one of the granted powers, such as the commerce clause, Congress may enforce the regulation by means of a tax.[1] *Veazie Bank* v. *Fenno,* 8 Wall 533; *Head Money Cases,* 112 U. S. 580; *Board of Trustees of the University of Illinois* v. *United States,* 289 U. S. 48, 68. This principle was reaffirmed recently in *United States* v. *Butler* (decided January 6, 1936) where the Court stated, after holding that the tax levied under the Agricultural Adjustment Act was not a true tax:

> It does not follow that as the act is not an exertion of the taxing power and the exac-

[1] Petitioner has not denied that the tax is valid if the regulations come within the commerce power of Congress.

> tion not a true tax, the statute is void or the exaction uncollectible. For, to paraphrase what was said in *The Head Money Cases* (*supra*), p. 596, if this is an expedient regulation by Congress, of a subject within one of its granted powers, "and the end to be attained is one falling within that power, the act is not void, because, within a loose and more extended sense than was used in the Constitution" the exaction is called a tax.

No claim can be made in this case that Congress was not intending to exercise its commerce power when it enacted the Bituminous Coal Conservation Act. (Compare *Hill* v. *Wallace*, 259 U. S. 44.) Petitioner has not made any such contention, and the contrary appears from numerous sections of the Act itself. The Act is entitled "An Act to Stabilize the Bituminous Coal-Mining Industry and Promote its Interstate Commerce", etc. The second paragraph of Section 1 sets out with great particularity the belief of Congress that certain conditions and practices "bear upon", "directly affect", "disorganize" or "burden and obstruct" interstate commerce or are "detrimental to fair competition" in interstate marketing and that regulation of these conditions and practices is necessary "for the protection of", or "to promote", or to "remove burdens and obstructions" from interstate commerce. The second introductory para-

graph of Section 4, providing for the formulation of the Bituminous Coal Code, states:

> For the purpose of carrying out the declared policy of this Act, the code shall contain the following conditions, provisions, and obligations *which will tend to regulate interstate commerce in bituminous coal and transactions directly affecting interstate commerce in bituminous coal.*[1]

Subsection (i) of Part II of Section 4 defining certain practices as unfair methods of competition is essentially an elaboration of the substantive provisions of the Federal Trade Commission Act. Section 13, which declares certain marketing agencies to be in violation of the Sherman Act unless approved by the Bituminous Coal Commission, is supplementary to the Sherman Act. Section 18, which confers authority on the Bituminous Coal Commission to act in conjunction with the Interstate Commerce Commission, is supplemental to the Interstate Commerce Act. All these provisions indicate that Congress intended to act under the same power in pursuance of which previous statutes regulating commerce had been enacted.[2]

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[1] In this brief all italics used in quotations are, unless otherwise indicated, supplied.

[2] A considerable portion of the report of the House Committee on Ways and Means is devoted to the argument that the Act is a valid regulation of interstate commerce (H. R. 1800, 74th Cong., 1st Sess., pp. 3–10, 12–13). The report states categorically that:

> This bill is founded on the principle that, for the protection of the public and to prevent restraint upon and to foster interstate commerce in bituminous coal,

The imposition of the penalty tax by way of denial of the drawback is designed solely to compel compliance by the producer with the regulations constitutionally within the power of Congress under the commerce clause; and, as will be shown later, full and complete opportunity is afforded to the producer to secure judicial protection against all attempts to impose the penalty with respect to transactions he can prove not to come within the commerce power.[1]

> Federal regulation is necessary. This industry is Nation-wide in its extent, carries on extensive operations in interstate commerce, directly affects the interstate commerce in other industries dependent on bituminous coal for fuel, and presents problems national in their scope.

The two minority reports oppose the bill because the signers do not believe the Act to come within the Federal commerce power. See H. R. 1800, *supra*, pp. 45–46, 49–51.

The Committee also asserted that the bill might be sustained under the taxing power, both separately and as an aid to the regulation contemplated under the commerce clause. In its discussion of the tax provisions the Committee said (*Ibid*, p. 10):

> Taken together with the exercise of the other powers in the bill it cannot be said that the tax is not a reasonable exercise of the power to aid in the enforcement of powers otherwise valid. No provision of the Constitution prevents the exercise simultaneously of two granted powers or prevents the exercise of one in aid of another.

The commerce clause was again and again referred to in the debates in Congress as the constitutional power under which the bill could be sustained. See Cong. Rec. Aug. 16 and 17, 1935, pp. 13822, 13828, 13829, 13833, 13835–8, 13844–6, 13858, 13864–6, 14007.

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[1] See pp. 146 to 149.

II. The Price Provisions

THE PROVISIONS OF THE ACT WITH RESPECT TO PRICE REGULATION ARE CONSTITUTIONAL

A. THE PROVISIONS OF THE ACT WITH RESPECT TO PRICE REGULATION ARE A VALID EXERCISE OF THE POWER OF CONGRESS TO REGULATE COMMERCE AMONG THE SEVERAL STATES

The first major question presented by this case is whether under the Constitution Congress has power to regulate prices for sales of bituminous coal in or directly affecting interstate commerce.

It is to be noted at the outset that there is no question here involved as to the power of Congress to prohibit interstate commerce in lawful articles, since the statute contains no prohibition and petitioner's contention (Br. p. 182) that Congress has no such power is therefore irrelevant.

The Government submits that the provisions of the Bituminous Coal Conservation Act with respect to price regulation are a valid exercise of the power of Congress to regulate commerce among the several States.

Petitioner denies such power broadly, quite apart from reliance on objections based upon specific detailed provisions of the Act.

Not merely does petitioner contend that the price-fixing provisions, like the other provisions of the Act, are invalid because, as he alleges, the purpose of Congress in enacting the Act as a whole was to accomplish another objective than the mere regulation of commerce; but he goes still further

and denies altogether that the commerce power of Congress can be employed to regulate prices of articles sold across State lines.

The Government's position is:

1. That the States have no power to regulate sales in interstate commerce for any purpose and therefore the price regulatory provisions of the present statute invade no reserved power of the States to regulate prices in such sales.

2. That the power of Congress to regulate prices in interstate commerce of commodities of such character that as to them price-fixing does not violate the due process clause of the Fifth Amendment is an incident of the Federal power to regulate sales in or directly affecting interstate commerce.

3. That the regulation of prices embodied in the Bituminous Coal Conservation Act is not for such a purpose as ~~the~~ to place that regulation beyond the scope of the commerce power, but is on the contrary for a purpose for which the commerce power may constitutionally be exercised.

Petitioner's argument apparently goes on two grounds, first, the broad and all-embracing ground that the power over interstate commerce does not include the power to regulate prices in interstate commerce transactions at all, and, secondly, the somewhat narrower ground that the interstate commerce power may not be constitutionally employed if its exercise is intended to produce such results as economic stability, industrial rehabilita-

tion, etc., which he suggests are expected to flow from the legislation here in question.

Both these arguments, the broader and the narrower one, are rested by petitioner mainly on the contention that they embody propositions essential to the preservation of our Federal system of dual government by State and Nation. This contention is based in part upon argument from the cases, in part upon historical considerations and in part upon a philosophy of government advanced in petitioner's brief.

Upon these issues the Government contends in the first place that upon the precedents established by this Court Congress has power, under the commerce clause, to regulate the prices of sales of such a commodity as bituminous coal in or directly affecting interstate commerce for the purposes contemplated by the Bituminous Coal Conservation Act. Issues that may be raised under the Fifth Amendment as to the alleged unreasonable or arbitrary character of price regulation with respect to coal are reserved for later treatment.

1. *The States have no power to regulate sales in interstate commerce for any purpose, and therefore, the price regulatory provisions of the present statute invade no reserved power of the States to regulate prices in such sales*

It is clearly established that the power to regulate sales in interstate commerce, which is the power involved in the price-fixing provisions

of the Bituminous Coal Conservation Act, is constitutionally beyond the power of the several States. Price regulation is merely a regulation of one of the terms of a contract of sale. Power to regulate the sale carries with it the power to regulate the terms of the sale including the price, unless prohibited by the due process clause or some other express prohibition of the Constitution. Conversely, power to regulate the price does not exist where there is no power to regulate the terms of the sale.

State power over sales in interstate commerce.— The decisions of this Court have sharply limited the extent to which the regulatory powers of the States may be exerted over sales of commodities which are transported across State lines. Restrictions have been imposed, both with respect to regulation by the State of destination of the commodity and with respect to regulation by the State of origin. In *Leisy* v. *Hardin,* 135 U. S. 100, the States were held not to have the power to prohibit the sale in the original package of intoxicating liquor brought in from another State, and the contrary determination in the *License Cases,* 5 How. 504, in which such regulation had been upheld, was expressly overruled. Recently, in *Baldwin* v. *Seelig,* 294 U. S. 511, a provision in the New York Milk Control Act which forbade wholly all sales of milk bought in other States at a price less than that permissible in New York was held to be in-

valid even as to milk sold in other than the original containers.

Similar restrictions have been imposed on the regulatory power of the State of origin of a commodity. In *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, a sale of wheat in Kentucky for shipment to a mill in Tennessee was held to be a transaction in interstate commerce, from which it was held to follow that a Kentucky corporation statute which operated to prevent suit for breach of the contract could not constitutionally be applied. "Where goods are purchased in one State for transportation to another the commerce includes the purchase quite as much as it does the transportation." (p. 290.) In *Flanagan* v. *Federal Coal Co.*, 267 U. S. 222, a Tennessee statute which operated to prevent suit for breach of a contract for the sale of coal f. o. b. mine was held not to be constitutionally applicable where it was understood between the parties that the dealings "were steps in sending coal from the mines to purchasers in other States." (p. 225.)

The facts in the *Dahnke-Walker* and the *Flanagan* cases closely approximate the facts in the case at bar.[1] *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50,

[1] Coal is ordinarily sold f. o. b. mine (*supra*, p. 27). Petitioner has conceded that such sales for destinations in States outside the State of production are sales in interstate commerce (R. 381). See *Flanagan* v. *Federal Coal Co.*, *supra*; *Pennsylvania R. Co.* v. *Sonman Shaft Coal Co.*, 242 U. S. 120, 122; *Temple Anthracite Coal Co.* v. *Federal Trade Commission*, 51 F. (2d) 656, 659.

presents an even stronger illustration of the incompetence of the States. There the Court held that the commerce clause prevented the application of a North Dakota statute which regulated the business of purchasing grain within the State including a provision for the fixing of price by a State officer. The grain was sold to elevator operators who took delivery within the State and stored it there. Shipment to other States took place subsequently as the elevator operators desired. Nevertheless, the regulation was held to be a regulation of interstate commerce because it appeared that a very large proportion of the grain grown in North Dakota was habitually shipped outside the State after its purchase. See also *Shafer* v. *Farmers Grain Co.*, 268 U. S. 189.

Federal power over sales in interstate commerce.—It is clear, therefore, that State regulation of the price of coal sold f. o. b. mine or destination for delivery outside the State of production would be a violation of the commerce clause. Where it appears that State regulation is precluded from application by reason of the commerce clause, it necessarily follows that the subject matter is within the scope of the Federal power over commerce. To hold otherwise would be to create a vacuum in the power to regulate commerce from which both State and Federal power would be excluded and to override the established doctrine that "the power to regulate commerce here meant to be granted was

that power to regulate commerce which previously existed in the states." Mr. Justice Johnson in *Gibbons* v. *Ogden,* 9 Wheat. 1, 227. See also *South Carolina* v. *Georgia,* 93 U. S. 4, 10. As James Madison wrote: "The powers [of the United States and the States] taken together, ought to be equal to all of the objects of government not specially excepted for special reasons, as in the case of duties on exports." *Letters and Other Writings of James Madison,* 250.

In the *Head Money Cases,* 112 U. S. 580, a decision that a Federal statute regulating immigration was a valid exercise of the commerce power was reached on the basis of prior decisions holding State regulation of the same subject matter unconstitutional, and it was declared (p. 593):

> It cannot be said that these cases do not govern the present, though there was not then before us any act of Congress whose validity was in question, for the decisions rest upon the ground that the State statutes were void only because Congress, and not the States, was authorized by the Constitution to pass them, and for the reason that Congress could enact such laws, and for that reason alone were the acts of the State held void. *It was, therefore, of the essence of the decision which held the State statutes invalid, that a similar statute by Congress would be valid.*

The existence of this power of the Federal government which follows from the constitutional in-

competence of the States has been recognized expressly by this Court. While the Federal government has not previously undertaken to exercise its power of price regulation except with respect to charges by commission men, etc., in stockyards, as in the Packers and Stockyards Act, and with respect to transportation, this Court has on several occasions clearly stated that such a power exists in the Federal government under the commerce clause.

In *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50, the Court, while holding a State to be precluded by the commerce clause from giving to a State officer power to fix the price to be paid for grain grown and delivered within the State where such grain was habitually shipped out of the State after its purchase, expressly adverted to the fact that the Federal government may pass legislation of this character. It was said (pp. 60–61):

> It is alleged that such legislation is in the interest of the grain growers and essential to protect them from fraudulent purchases, and *to secure payment to them of fair prices* for the grain actually sold. This may be true, but *Congress is amply authorized to pass measures to protect interstate commerce if legislation of that character is needed.* The supposed inconveniences and wrongs are not to be redressed by sustaining the constitutionality of laws which clearly encroach upon the field of interstate commerce placed by the Constitution under federal control.

The decision thus recognizes, in the case of a commodity seeking an assured extra-state market, the intimate connection between the prices to be paid the producer and the ensuing interstate commerce in the commodity, and clearly implies that to the authority vested with power over the commerce must belong also the power to regulate the prices, when price regulation is under the due process clause a permissible exercise of governmental control.

In *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83, it was held that the rates of electricity produced within one State and sold within that State for transmission to another State are not subject to regulation by the State of production. Both the majority and minority opinions state clearly that the power to regulate the rate resides in the Federal Government. The Court said (p. 90):

> The rate is therefore not subject to regulation by either of the two States in the guise of protection to their respective local interests; but, *if such regulation is required it can only be attained by the exercise of the power vested in Congress.*

In the dissenting opinion it was said (p. 91):

> If the Commission lacks the power exercised, it is solely because the electricity is delivered for use in another State. That fact makes the transaction interstate commerce, *and Congress has power to legislate on the subject.*

Finally, in *Baldwin* v. *Seelig,* 294 U. S. 511, in which it was held that New York did not have the power to forbid sales of milk bought in other States at a price less than that permissible in New York, it was said (p. 522):

> If New York in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals *that were meant to be averted by subjecting commerce between the States to the power of the Nation.*

Thus repeatedly it has been established that the absence of State power with respect to interstate prices is the resultant of the existence of Federal power to regulate them.

2. *The power of Congress to fix prices in interstate commerce of commodities of such character that as to them price fixing does not violate the due process clause of the Fifth Amendment is an incident of the Federal power to regulate sales in or directly affecting interstate commerce.*

The power of Congress to regulate contracts in or duly affecting interstate commerce has never been doubted and cannot at this late day be denied. Upon that power rest many of the most familiar Federal statutes—for example, the Sherman Anti-trust Act, many provisions of the Clayton Act, the Federal Trade Commission Act, the Grain Futures Act, the Packers and Stockyards Act, etc. Section

3 of the Clayton Act, prohibiting so-called "tying clauses" illustrates the exercise by Congress of its power to prohibit certain types of terms in contracts of sale. The power of the Federal Trade Commission to prohibit unfair forms of advertising can only be sustained because such advertising is incidental to interstate sales. If Congress can regulate a mere inducement to a contract of sale like advertising, it can obviously regulate, subject always to the due process clause, the terms of the sale itself, as it has done in Section 3 of the Clayton Act.

So far as relates to the commerce clause, price is a term like any other term in a contract, and the power to regulate contract terms carries with it the power to regulate price subject only to compliance with the requirements of due process. This power Congress has also exercised, as for example in Section 2 of the Clayton Act, which directly regulates the price term in interstate commerce by prohibiting directly or indirectly discriminations in prices to different purchasers. Again, in the Packers and Stockyards Act Congress has authorized the Secretary of Agriculture to regulate the service charges of market agencies buying or selling live stock on commission bases or furnishing stockyard services.

In the Grain Futures Act, upheld in *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, Congress made use of the commerce power to regulate trad-

ing practices on grain exchanges. The regulation was held to be valid because of the effect of these practices in depressing the price of commodities moving in interstate commerce, the Court saying (pp. 39–40):

> If a corner and the enhancement of prices produced by buying futures[1] directly burden interstate commerce in the article whose price is enhanced, it would seem to follow that manipulation of futures which unduly depress prices of grain in interstate commerce and directly influence consignment in that commerce are equally direct.

The situation of the bituminous coal industry may be significantly compared with the situation involved in the *Olsen* case. There the activity regulated by the statute was not the sale and delivery of actual grain, but contracts of sales of grain for future delivery, most of which, as the Court pointed out, do not result in actual delivery but are settled by offsetting them with other contracts of the same kind. Thus the transactions regulated were not in interstate commerce but were purely local, and most of them could not even lead to interstate activity. The primary effect of the practices there regulated was to cause undue fluctuation in the price of cash grain. Disturbance of the normal flow of commerce in grain was there secondary, the Court citing one instance in

[1] The reference is to *United States* v. *Patten*, 226 U. S. 525.

which the price of futures rose rapidly and had the effect of inducing large quantities of cash wheat to be taken out of the normal channels of distribution and brought to Chicago for delivery at the attractive price. (See 262 U. S. at 13, 38.)

In the case at bar, the activities under consideration are sales in interstate commerce, not local activity affecting interstate commerce. The record shows plainly the direct and historic consequence on interstate commerce of indulgence in the practices regulated by the Act. The Court below found that during the period following 1923, the competitive cutting of prices occasioned a large shift or diversion of shipments of coal from the fields north of the Ohio and Potomac rivers to the fields immediately south of the rivers. (Fg. 118, R. 179.) "The shift or diversion of shipments after 1923 from the northern to the southern group was primarily due to a reduction of f. o. b. mine prices in the South more rapidly than in the North, the spread between southern and northern f. o. b. mine prices being substantially increased after 1923." (Fg. 122, R. 181.) Obviously, such a situation is to be considered more significant from the standpoint of the applicability of the commerce power than was the occasional diversion of shipments of grain caused by the practices sought to be regulated under the Grain Futures Act. And, if the Federal power extends to the

regulation of local activity which affects interstate price and occasionally affects interstate shipment, it must *a fortiori* extend to the regulation of the interstate price itself, particularly where competitive price cutting has had so striking and controlling an effect on interstate shipment.

It is established that "the question of price dominates trade between the states" (*Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, 40). Can it be doubted then that the power to regulate interstate commerce includes the power to regulate price?

Petitioner puts forward the view that though the power to regulate prices in interstate commerce clearly is not possessed by the States, nevertheless it does not reside in the Federal government and that it must, therefore, be regarded as one of the powers reserved to the people under the Tenth Amendment.

There is clearly no basis in the language of the Constitution itself or in the construction which that language has hitherto received for singling out the price term from other terms in contracts in interstate commerce so far as relates to inclusion under the congressional power to regulate interstate commerce. Neither the commerce clause nor the Tenth Amendment requires or warrants such a distinction or supplies any standard whatever for applying it. The distinction being without foundation is purely an arbitrary invention.

Petitioner's argument is plainly inconsistent with the language and intent of the Tenth Amendment. The only reason why this Court has denied to the several States, whether of origin or destination, the power to regulate and control sales in interstate commerce is because it has held that the power to regulate such sales is vested in Congress by the commerce clause. *Dahnke-Walker Co.* v. *Bondurant, supra; Flanagan* v. *Federal Coal Co., supra.* In other words, the limitation on the State results precisely from the fact that the power to regulate has been granted to the Federal government. How can it be argued that a power of which one sovereignty was deprived only because it was transferred to another sovereignty resides in neither of them? A similar argument has been made to this Court before and the Court has refuted it on the ground that it amounts to saying "that the power perished as the result of the act by which it was conferred." *Intermountain Rate Cases,* 234 U. S. 493. Petitioner may answer that he means his argument to apply not to the power over contract terms in general, but only to the power over price. Such an answer puts him to the proof that the commerce clause distinguishes between the price term and other terms of contracts in interstate commerce and, as pointed out above, there is not a scintilla of proof for such a distinction.

3. *The Regulation of Prices Imposed in the Bituminous Coal Conservation Act is for a Purpose for Which the Commerce Power May Constitutionally be Exercised.*

Petitioner takes the position that the provisions of the Bituminous Coal Conservation Act with respect to price regulation do not constitute a valid exercise of the power of Congress to regulate interstate commerce because, he contends, they were enacted for purposes for which the commerce clause may not be employed. The major part of petitioner's brief is devoted to developing this argument in one form or another. Thus, petitioner variously urges that the commerce power may be used only "to keep commerce free" by removing burdens and obstructions therefrom; or to "promote" commerce; or for an end "having a real and substantial relation to the regulation of interstate commerce"; and that it may not be constitutionally employed if the intended purpose is to "stabilize" the coal industry, or to improve industrial conditions in that industry, or to accomplish some similar purpose which is not named in the constitutional grant of powers to the Federal Government. To this the Government answers:

(i) That while the power of Congress over commerce among the States extends to the removal of burdens and obstructions to the free flow of such commerce, it is not limited to that purpose; but in any event the purpose of the Bituminous Coal Con-

servation Act is to remove burdens and obstructions from interstate commerce in the sense in which those terms are used in the precedents.

(ii) That while the power of Congress over commerce among the States may be used for the purpose of promoting such commerce by increasing its volume or otherwise, it is not limited to that purpose; but in any event the provisions of the Bituminous Coal Conservation Act are designed to promote commerce among the States in the sense in which word "promote" is used in the precedents.

(iii) That the power of Congress to regulate commerce among the States may, so far as it extends, be employed to prevent or check any public evil or harm which occurs in or as a result of transactions in such commerce, and when so employed is employed for a proper "commerce" purpose; and the objective sought to be attained by the Bituminous Coal Conservation Act is the removal of evils which occur in or as a result of transactions in interstate commerce.

(i) *While the power of Congress over commerce among the States extends to the removal of burdens and obstructions to the free flow of such commerce, it is not limited to that purpose; but in any event the purpose of the Bituminous Coal Conservation Act is to remove burdens and obstructions from interstate commerce in the sense in which those terms are used in the precedents.*

Petitioner argues that the power of Congress under the commerce clause is limited to the removal

of obstructions and restraints on the free flow of that commerce, and apparently that the power of positive regulation for other purposes exists only with respect to transportation. There is nothing in the commerce clause or in the decisions from which any warrant may be derived for such a distinction between transportation and other forms of commerce and the distinction is purely arbitrary. Petitioner's conception of the commerce clause as limited to the removal of obstructions makes it not a positive grant of power to the Federal Government "to prescribe the rule by which commerce is to be governed" as Marshall said it was (*Gibbons* v. *Ogden*, 9 Wheat. 1), but a mere negative restriction on States and individuals which confers on the Federal Government nothing more than the limited power to see that this restriction is maintained.

This is not the conception of the Federal power over interstate commerce which this Court has laid down in its decisions. Thus, in *Gibbons* v. *Ogden*, 9 Wheat. 1, Mr. Chief Justice Marshall in speaking of the commerce power said that it is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution" * * * "It is vested in Congress as absolutely as it would be in a single Government having in its constitution the same restrictions on the exercise of the power as

are found in the Constitution of the United States." 9 Wheat., at 196–197.

In the same case Mr. Justice Johnson said in his concurring opinion (at 227):

> The power of a sovereign state over commerce therefore amounts to nothing more than a power to limit and restrain it at pleasure and since the power to prescribe the limits to its freedom necessarily implies the power to determine what shall remain unrestrained, it follows that the power must be exclusive.

Again in *In re Rahrer,* 140 U. S. 545, this Court was called upon to meet the argument that while the commerce clause is a restriction upon the power of the States to impose regulations on commerce, it confers no such restrictive power on the Federal Government. The Court said (at 561):

> Thus the grant to the general government of a power designed to prevent embarrassing restrictions upon interstate commerce by any state would be made to forbid any restraint whatever. We do not concur in this view. In surrendering their own power over external commerce the states did not secure absolute freedom in such commerce but only the protection from encroachment afforded by confiding its regulation exclusively to Congress.

Again in *United States* v. *E. C. Knight Co.,* 156 U. S. 1, at 11–12:

> The Constitution does not provide that interstate commerce shall be free, but by the

grant of this exclusive power to regulate it, it was left free except as Congress might impose restraints.

It is true that many of the cases under the commerce clause deal with obstructions and restraints. For this there are two explanations. The first arises from the fact that the majority of commerce clause cases have involved the validity or invalidity of State statutes. In these cases the question whether or not the commerce clause operates as a limitation upon any particular exercise of State power is one that depends for its answer upon whether or not the exercise of State power constitutes a restraint upon interstate commerce. The very reason, however, why a State-imposed restraint upon interstate commerce is unconstitutional is because under the commerce clause the Federal Government alone has power to impose such restraints and hence the State in imposing a restraint is invading a sphere of power exclusively reserved to the Federal Government.

The second reason why many of the commerce clause cases have dealt with burdens and restraints is because Congress in some of its most important statutes, notably the Antitrust Laws, has adopted a legislative policy of favoring free competition and in the execution of that policy has made certain kinds of burdens and restraints unlawful. In cases arising under such statutes the emphasis upon the burdens and restraints has been for the purpose of

delimiting the scope of the statute rather than of determining the limits of constitutional power.

This Court has repeatedly said that the power of Congress to regulate commerce among the several States includes not only the power to remove restraints and obstructions, but also "to foster, protect, control and *restrain*". *Second Employers' Liability Cases*, 223 U. S. 1, 47; *Dayton-Goose Creek Railway* v. *United States*, 263 U. S. 456, 478; *Texas and New Orleans R. R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548, 570.

In any event the terms "burden" and "obstruction" as used in the cases do not imply that Congress in regulating interstate commerce must refrain from restrictions upon the free choice and free action of business men and may not subject the terms of their contracts to regulation. The very Antitrust Laws whose object is to preserve competition, and in that sense to protect commerce from burdens and obstructions, recognize that to accomplish this result it is often necessary to regulate the terms of contracts and accordingly to impose such regulations or restraints upon some of the most important provisions of such contracts. Congress, however, is under no constitutional obligation to adopt a legislative policy of maintaining free competition. It may restrict and has restricted such competition when in its judgment the result of competitive methods or practices has been deleterious; and in the cases a deleterious result occurring in the course of commerce, or as a result of a

particular method of carrying on commerce, has frequently been referred to as a burden upon, or obstruction to, commerce. This appears from a comparison of the provisions of the statute involved in *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, with the language of the Court in that case, at 37:

> In the act we are considering, Congress has expressly declared that transactions and prices of grain in dealing in futures are susceptible to speculation, manipulation, and control, which are detrimental to the producer and the consumer and persons handling grain in interstate commerce and render regulation imperative for the protection of such commerce and the national public interest therein.
>
> It is clear from the citations, in the statement of the case, of evidence before committees of investigation as to manipulations of the futures market and their effect, that we would be unwarranted in rejecting the finding of Congress as unreasonable, and that in our inquiry as to the validity of this legislation we must accept the view that such manipulation does work to the detriment of producers, consumers, shippers and legitimate dealers in interstate commerce in grain and that it is a real abuse.

This Court then went on to say, speaking of the way in which this abuse operated (pp. 39–40):

> If a corner and the enhancement of prices produced by buying futures directly burden interstate commerce in the article

> whose price is enhanced, it would seem to follow that manipulations of futures which unduly depress prices of grain in interstate commerce and directly influence consignment in that commerce are equally direct.

Then this significant language is used (p. 40):

> The question of price dominates trade between the States. Sales of an article which affect the country-wide price of the article directly affect the country-wide commerce in it. By reason and authority, therefore, in determining the validity of this act, we are prevented from questioning the conclusion of Congress that manipulation of the market for futures on the Chicago Board of Trade may, and from time to time does, directly burden and obstruct commerce between the States in grain, and that it recurs and is a constantly possible danger.

It is clear from this language that something which works to the detriment of producers, consumers, shippers, and legitimate dealers in interstate commerce is what the Court means by a "burden" on interstate commerce, and a burden in such sense that Congressional legislation under the commerce power may properly be enacted to remove it.

As was pointed out by this Court in the *Olsen* case, the evils of competition, when competition reaches the point where it begins to produce effects that are thought to be undesirable, generally work themselves out through prices or through their effect upon prices. As the Court says, the question

of price dominates trade between the States, so that effective regulation to meet these evils must have something to do with price, either through regulating it directly or through regulating some of the terms and conditions which produce it. For this reason legislation which operates to remove a burden on interstate commerce may take the form of price regulation in some shape.

In enacting the Bituminous Coal Conservation Act, Congress found, on the basis of numerous investigations undertaken during the last twenty years, that conditions and practices existed which had burdened and obstructed interstate commerce in bituminous coal. The findings of the Court below fully substantiate the congressional findings. Destructive price cutting, carried on for many years "has directly burdened and restrained interstate commerce" in coal and "has caused substantial dislocation to and diversion of the normal flow of such commerce" (Fig. 180, R. 210). Unrestrained and destructive competitive conditions have occasioned many unfair competitive practices which have served to further demoralize the industry and to place added burdens and restraints upon interstate commerce (Fg. 181, R. 210). Unrestrained and destructive competition leading to the competitive cutting of wage rates has brought about many strikes which have closed down many mines, have caused violent and wide fluctuations in the price of coal to the consumer, have caused hardship and put burdens upon many consumers, have

threatened to and have "interrupted and obstructed interstate commerce" in coal, and "at times have even threatened to stop such interstate commerce for indefinite periods" (Fg. 184, R. 211). A statute designed to eliminate conditions and practices which have such effects upon interstate commerce fully meets any test of the scope of the commerce power, no matter how narrowly conceived.

(ii) *While the power of Congress over commerce among the States may be used for the purpose of promoting such commerce by increasing its volume or otherwise, it is not limited to that purpose; but in any event the provisions of the Bituminous Coal Conservation Act are designed to promote commerce among the States in the sense in which the word "promote" is used in the precedents.*

We have shown that when the object of an exercise of the commerce power is said to be the removal of "burdens" and "obstructions" from interstate commerce, it is broad enough to include more than merely the protection of businessmen and business dealings from restraints on their freedom of action. So when that object is said to be the "promotion" of interstate commerce, it is likewise broad enough to include more than merely increasing the physical volume of goods moving in such commerce or providing for its physical safety. The cases employ the word "promote" much as they employ the words "removal of burdens and obstructions" to signify whatever may render the commerce more convenient and advan-

tageous both to those who engage in it and to the general public.[1] To promote commerce is to remove obstructions from it and we have already seen that a removal of an obstruction from commerce may consist in eliminating from the conduct of commerce various practices and conditions which cause loss and injury to those who engage in it or to those who are served by it.

Much of the legislation sustained by this Court as an exercise of the commerce power has, so far from increasing the volume of commerce or providing for its safety, actually destroyed it by prohibition without in any way tending to increase the volume or promote the safety of commerce in other articles. Such was the purpose of the acts sustained in the *Lottery Case,* 188 U. S. 321 (lottery tickets); in *Hipolite Egg Co.* v. *United States,* 220 U. S. 45 (Pure Food and Drugs Act); in *Weber* v. *Freed,* 239 U. S. 325 (prize fight films); in *Hoke* v. *United States,* 227 U. S. 308 (White Slave Act); in *Clark Distilling Co.* v. *Western Maryland Ry. Co.,* 242 U. S. 311 (intoxicating liquors); and in *Brooks* v. *United States,* 267 U. S. 432 (stolen automobiles).

We have already shown the burdens and obstructions to which interstate commerce in bituminous coal has been subject for many years (*supra,* p. 125.) The provisions of the present Act are de-

[1] *The Daniel Ball,* 10 Wall. 557, 565; *Texas & N. O. R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548, 570; *Dayton-Goose Creek Ry. Co.* v. *United States,* 263 U. S. 456, 478.

signed to remove these burdens and obstructions and the Act is therefore designed to "promote" commerce in bituminous coal among the states.

(iii) *The power of Congress to regulate commerce among the States may, so far as it extends, be employed to prevent or check any public evil or harm which occurs in, or as a result of transactions in, such commerce, and when so employed is employed for a proper "commerce" purpose; and the object sought to be attained by the Bituminous Coal Conservation Act is the removal of evils which occur in or as a result of transactions in interstate commerce.*

Petitioner contends that a statute otherwise valid as a regulation of interstate commerce is rendered invalid if the purpose of the statute does not "bear any reasonable relation to the regulation of interstate commerce" (Pet. Br. pp. 103 ff.). Apparently the phraseology in which this contention is couched was deliberately chosen to avoid the express assertion of an untenable proposition seemingly meant to be implied. Stated as it is, the contention is merely circular and meaningless. A regulation of an interstate commerce subject matter for whatever purpose bears a real and substantial relation to the regulation of interstate commerce since it is itself a regulation of interstate commerce. What petitioner apparently wishes to imply and yet not assert is that the power to regulate commerce may not be employed for *any* objective more ultimate than the immediate removal of burdens and restraints upon interstate commerce (Pet. Br. pp.

103 ff.). Petitioner contends apparently that any regulation of commerce which serves *any other or further* purpose, or has any other and further ultimate effect, is for that reason beyond the scope of the power to regulate commerce.

This contention seems to rest upon a complete confusion between a governmental *power* on the one hand and the *subject matter* upon which, and the *purpose* or *objective* for which, the power may be exercised, on the other. The Constitution delegates to the Federal Government certain express powers, of which the power to regulate interstate commerce is one. It does not specify the subject matters upon which this or any other granted power may be exercised. It does not set forth the particular purposes for which this or other granted powers may be used. It does not say that the power to tax may be exerted upon State chartered corporations or upon the right to inherit property or upon the manufacture or sale of commodities. It does not say that this power may be exerted for the purpose of accumulating funds to spend in building roads, or for the purpose of enhancing the price of foreign goods in order that American citizens may find it more advantageous, and therefore may be induced, to buy the products of home manufacture. The same thing is true of the power to regulate commerce. The Constitution does not set forth that the power to regulate commerce extends over navigation or railroads or sales of the

products of factories. It does not say that the power may be used to insure the safety of individuals traveling in railroad trains, or to protect the interest of shippers in not having to pay excessive freight rates, or to preserve the morals of the community by making it unlawful to transport women across a State line for immoral purposes, or to safeguard the health of the community by penalizing the shipment in interstate commerce of impure foods or adulterated drugs.

The fact that the wide varieties of subject matter upon which the granted powers of Congress may be exerted, and upon some of which they will have to be exerted if they are exerted at all, are not specifically enumerated in the Constitution, obviously does not mean that Congress may not exert its powers upon any such unenumerated subject matters. In the same way the fact that the various objectives which may be deemed desirable by Congress, and for which Congress may conceivably wish to assert one or more of its granted powers, are not expressly enumerated, does not mean that Congress must confine itself to objectives which *are* enumerated, for none are, save in the broad language of the preamble. The notion now embraced by the petitioner that the power to regulate commerce can be asserted only for the sake of commerce, or for "a purpose related to commerce" rests upon an assumption the acceptance of which elsewhere would make practically impossible either the con-

struction of the Constitution or the operation of Government under it.

The notion that a granted power may not be employed for any purpose not expressed in addition to the grant of the power is a fallacy which was early sought to be introduced into our constitutional thinking by opponents of a protective tariff, and was answered conclusively and exhaustively by Mr. Justice Story. Speaking of the taxing power, Mr. Justice Story says:

> The language of the Constitution is "Congress shall have power to lay and collect taxes, duties, imposts, and excises." If the clause had stopped here and remained in this absolute form, * * *. there could not have been the slightest doubt on the subject. The absolute power to lay taxes includes the power in every form in which it may be used, and for every purpose to which the legislature may choose to apply it. This results from the very nature of such an unrestricted power. *A fortiori* it might be applied by Congress to purposes for which nations have been accustomed to apply it. Now, nothing is more clear, from the history of commercial nations, than the fact that the taxing power is often, very often, applied for other purposes than revenue. It is often applied as a regulation of commerce. It is often applied as a virtual prohibition upon the importation of particular articles for the encouragement and protection of domestic products and industry; for the support of

> agriculture, commerce, and manufactures; for retaliation upon foreign monopolies and injurious restrictions; for mere purposes of state policy and domestic economy; sometimes to banish a noxious article of consumption; sometimes as a bounty upon an infant manufacture or agricultural product; sometimes as a temporary restraint of trade; sometimes as a suppression of particular employments; sometimes as a prerogative power to destroy competition, and secure a monopoly to the government. (Story, *Commentaries on the Constitution,* Sec. 965.)

The Constitution does not explicitly say that the Federal Government has *power* to encourage and protect domestic production, to support agriculture, commerce, and manufactures, to set up a policy of domestic economy, to restrain trade, temporarily or otherwise, to suppress particular employments, or to secure a government monopoly. The Constitution does, however, explicitly say that the Federal Government has power to lay and collect taxes, duties, imposts, and excises, and since the taxing power is susceptible of being used to further the foregoing objectives, the Federal Government, as Mr. Justice Story points out, has power to further them through use of the taxing power. The fact that they are not set out as express powers in the Constitution does not cut down the plenary grant of the taxing power to the point where it may not be exerted to effectuate them.

Mr. Justice Story develops the same argument in connection with the commerce power. (*Commentaries on the Constitution,* Secs. 1079–1089.) He states the position which he is refuting, and which represents precisely the position now taken by the petitioner, as follows:

> But the question is a very different one, whether, under pretense of an exercise of the power to regulate commerce, Congress may in fact impose duties for objects wholly distinct from commerce. The question comes to this, whether a power exclusively for the regulation of commerce is a power for the regulation of manufactures? (Sec. 1079.)

In answering the question he begins by pointing out that those who claim that the commerce power should be used only for the sake of commerce and the taxing power only for the sake of revenue "* * * admit that the power may be applied so as incidentally to give protection to manufactures when revenue is the principal design; and that it may also be applied to countervail the injurious regulations of foreign powers when there is no design of revenue" (Sec. 1081). He then continues:

> These concessions admit, then, that the regulations of commerce are not wholly for purposes of revenue, or wholly confined to the purposes of commerce, considered *per se.* If this be true, then other objects may enter

into commercial regulations; and, if so, what restraint is there as to the nature or extent of the objects to which they may reach, which does not resolve itself into a question of expediency and policy? It may be admitted that a power given for one purpose cannot be perverted to *purposes wholly opposite*, or beside its legitimate scope. But what perversion is there in applying a power to the very purposes to which it has been usually applied? (Sec. 1081.)

Now it is well-known that, in commercial and manufacturing nations, the power to regulate commerce has embraced practically the encouragement of manufactures * * * When the Constitution was framed, no one ever imagined that the power of protection of manufactures was to be taken away from the States, and yet not delegated to the Union. The manufacturing States would never have acceded to it upon any such terms * * * The same reasoning would apply to the agricultural States; for the regulation of commerce, with a view to encourage domestic agriculture, is just as important and just as vital to the interests of the Nation, and just as much an application of the power, as the protection or encouragement of manufactures. It would have been strange indeed if the people of the United States had been solicitous solely to advance and encourage commerce, with a total disregard of the interests of agriculture and manufactures * * *. (Sec. 1082.)

> Now the motive of the grant of the power [to regulate commerce] is not even alluded to in the Constitution. It is not even stated that Congress shall have power to promote and encourage domestic navigation and trade. A power to regulate commerce is not necessarily a power to advance its interests. It may in given cases suspend its operations and restrict its advancement and scope. Yet no man ever yet doubted the right of Congress to lay duties, to promote and encourage domestic navigation * * *. The motive to the exercise of a power can never form a constitutional objection to the exercise of the power. (Sec. 1089.)

Petitioner's argument amounts to contending that in addition to enumerating the powers conferred on the Federal Government, the Constitution should have enumerated the infinite variety of objectives for which those powers may be exercised. The framers of the Constitution, designedly according to Marshall, couched even their grants of power in broad general terms, leaving much to implication. What Marshall has said in a famous passage in regard to this economy of expression relating to powers, amply explains and justifies the decision of the framers not to enumerate objectives. Marshall says (*McCulloch v. Maryland,* 4 Wheat. 316, 407):

> A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by

> which they may be carried into execution, would partake of the prolixity of a legal code and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.

This Court has in repeated instances sustained exercises of the Federal power over interstate commerce to accomplish objectives, the promotion of which is not only not conferred by the Constitution in express terms on Congress but which, within the geographical limits of each separate State, could have been promoted by the exercise of the State police power. Thus Congress has no general power to protect the morals of the people of the United States and, more specifically, no power to give such protection by the suppression of lotteries. On the other hand, each State, within its own limits, may employ its police power to suppress lotteries. Nevertheless, this Court has held that the commerce power may be used with the objective of suppressing lotteries so far as that objective may be obtained by regulations of commerce, and the regulations are not invalid because the suppression of lotteries is their objective.

It could have been urged against the Pure Food and Drug Act that its objective was to promote

health and that the Constitution nowhere confers upon the Federal Government any power to promote health; it could have been urged against the Mann White Slave Act that its objective was to promote morality and that the Constitution nowhere confers upon the Federal Government the power to promote morality; it could have been urged against the automobile theft act that its objective was to prevent theft and that the Constitution nowhere confers upon the Federal Government the power to prevent breaches of State law. In all these cases, however, the Acts were sustained because, irrespective of their objective, they were obviously regulations of commerce; and the fact that their objective was, in one way or another, to promote the general welfare did not invalidate them as regulations of commerce, but served rather to explain and justify the regulation.

So in the present case the fact that the objective of the Bituminous Coal Conservation Act and the legislative policy which led to its enactment may have been the improvement of competitive conditions in the interstate marketing of bituminous coal, whether we speak of that improvement as "stabilization" or otherwise, does not and cannot prevent the statute from being an exercise of the power of Congress over interstate commerce.

It may well be that an improvement of competitive conditions in the interstate marketing of bituminous coal will, as one of its ultimate results, increase the incomes of the producers and employees in the bituminous coal industry and that the probability or possibility of that result was one of the thoughts in the mind of the Congress in enacting the legislation. It seems to be accepted as a fact that protective tariff legislation of the kind discussed by Mr. Justice Story (see *supra*, p. 133), while having for its objective the promotion of manufacturing and agriculture, is similarly expected to increase the income of factory owners, employees and farmers. Indeed, it could just as plausibly be stated that the ultimate purpose of a tariff act is to effect a redistribution of the national income through increasing the income of these classes of persons,[1] as it can be stated by the petitioner that the purpose of the Act now before the Court is to redistribute that income by allocating a larger share to mine owners and miners. In the case of the protective tariff, this possible ultimate effect and the fact that it may have been a motive in the minds of legislators have never been regarded as invalidating the tariff as an exercise of the commerce power. The tariff, irrespective of

[1] The Tariff Act of 1930, 46 Stat. 590, is entitled: "An Act To provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States, to protect American labor, and for other purposes."

its ultimate purpose of increasing the income of particular classes of persons, has been construed to be a regulation of commerce having for its objective the promotion of manufacturing and agriculture. Whatever the ultimate result of the Bituminous Coal Conservation Act in improving or not improving the economic position of the persons subject to its provisions may be, its objective, namely, the improvement of competitive conditions in the interstate marketing of coal, is one even more intimately related to and connected with commerce than is the promotion of manufacturing or agriculture.

So far as relates to the specific measures which Congress selected for the accomplishment of this objective, they consist of the regulation of competitive methods and practices—a matter of commerce, if ever there was. The regulation of competitive practices in interstate transactions has been the staple of Congressional regulation of commerce since the Sherman Act. To be sure, the regulations embodied in the Sherman Act were dictated by legislative preference for a policy of free competition. This Court, however, has said in *Northern Securities Co.* v. *United States,* 193 U. S. 197, 337, and, more recently, in *Nebbia* v. *New York,* 291 U. S. 502, 537, that the legislative body is constitutionally at liberty to choose between different economic theories. If it does so, as in the Bituminous Coal Conservation Act, and undertakes to restrict at

certain points the liberty of competition, it is nonetheless, still pursuing a "commerce" objective—the regulation of competition. Such a regulation is, contrary to the assertions of petitioner, directed toward commerce at a vital and significant point—the practices through which competition in commerce is carried on. If the purpose of a statute is to regulate this important aspect of commerce, and if the statute does so by applying its regulations, as in the case of the Bituminous Coal Conservation Act, to interstate transactions beyond the reach of State power, then the regulation is not invalidated by the fact that it may have been enacted with the ultimate objective of improving conditions in one of the great basic industries of the nation.

It is of course fully recognized that there may be instances in which it will appear by objective evidence on the face of a statute that what is in form and appearance the exercise of a granted power is in substance the exercise of a power not granted. In these instances the vice of the statute lies not in the purpose or objective for which a granted power is exercised, but in the fact that what appears to be an exercise of one power is in fact the exercise of another. This was the situation presented in *Hammer* v. *Dagenhart,* 247 U. S. 251. There the statute bore the superficial aspect of a regulation of commerce, but upon examination the real and substantial regulations which it contained bore directly

upon, and were direct regulations of, a social and local matter, child labor, which, in so far as it was an evil, was not an evil occurring in or arising out of transactions in interstate commerce. The detailed regulatory provisions and the whole scheme of the statute operated in effect directly to regulate not commerce or commercial transactions, but conduct not in itself directly affecting commerce among the States. The prohibition of transportation in interstate commerce was not in itself a substantive regulation but a mere extraneous lever to compel compliance with a regulation of matters not directly affecting commerce.

Of the Act now under consideration it is impossible to say that it is not a substantive regulation of commerce, since it is a direct regulation of sales and prices in interstate commerce with the objective of regulating competition in interstate commerce, which is clearly a commercial matter. From the standpoint of the commerce clause the Bituminous Coal Conservation Act is a statute of the same general character as the Sherman Anti-Trust Act, operating upon competition in interstate commerce and differing from the Sherman Act mainly in the legislative policy with respect to the commerce involved. Unlike the Child Labor Act, the regulations here imposed on prices in interstate transactions are completely beyond the power of any State to impose.

On the present issue *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, is not in point, since the Act there involved did not regulate transactions in commerce at all, but operated upon conduct outside of commerce on the theory that it affected commerce, but which was found by this Court not to be directly related thereto. The Court there held that the asserted relation between a pension scheme and the efficiency and safety of interstate transportation did not exist, and the Act fell of necessity, no other source of Congressional power being urged. Here, the regulation of price is a direct and immediate regulation of an interstate commerce transaction in a manner similar to the regulation of railroad rates.

It was not the various beneficial social objectives which Congress envisaged in the Railroad Retirement Act that caused that statute to be invalid. They were irrelevant to the issue of constitutionality since the Act itself did not regulate commerce and therefore was not an exercise of the commerce power. The *Railroad Retirement* case would furnish support for petitioner's contention only if the Court had held that a pension system which did in fact promote efficiency and safety of transportation and which therefore regulated matters directly affecting commerce, was made invalid by the fact that Congress also attempted to achieve social objectives thereby. But this, of course, the Court did not suggest by remotest implication. On the

contrary, in its discussion of the validity of a Federal workmen's compensation law, the Court said (p. 371):

> The collateral fact that such a law may produce contentment among employees,—an object which as a separate and independent matter is wholly beyond the power of Congress,—would not, of course, render the legislation unconstitutional.

The Government has not emphasized or insisted upon the authority of cases like *The Lottery Case,* 188 U. S. 321, *Hoke* v. *United States,* 227 U. S. 108, and *Brooks* v. *United States* 267 U. S. 432, because they go beyond what in this case the Government is required to sustain. Here the object of the regulations contained in the Bituminous Coal Conservation Act is, as has been pointed out, a commerce object—the regulation and improvement of competitive conditions in the bituminous coal industry, thereby removing obstructions to and interference with interstate commerce in bituminous coal. The cases just cited establish the proposition that where there is a true regulation of commerce and not as in *Hammer* v. *Dagenhart, supra,* a merely specious one, the objective of the regulation may be something that reaches beyond a mere commerce objective and may be to accomplish some desirable result for the people of the United States. Mr. Justice Harlan, writing for this Court in *The Lottery Case,* said that the Act there upheld was "for the purpose of guarding the people of the United States against the wide-

spread pestilence of lotteries". (188 U. S. 321, at 357.) Mr. Chief Justice Taft, writing for a unanimous Court in *Brooks* v. *United States, supra,* said that "Congress can certainly regulate interstate commerce to the extent of punishing the use of such commerce as an agency to promote * * * the spreading of any evil or harm to the people of other States from the State of origin", and he added that "in doing this it is merely exercising the police power for the benefit of the public within the field of interstate commerce". This Court in *Nebbia* v. *New York,* 291 U. S. 502, has again reaffirmed the proposition that the Federal Government may use its granted powers to promote the general welfare just as the States may use their reserved powers for that purpose. The Court said (p. 524):

> Thus has this court from the early days affirmed that the power to promote the general welfare is inherent in government. Touching the matters committed to it by the Constitution, the United States possesses the power as do the states in their sovereign capacity touching all subjects jurisdiction of which is not surrendered to the federal government.

This power to promote the general welfare by appropriate legislation is usually referred to in the case of the States as their police power, and Mr. Chief Justice Taft, in the passage above quoted from the *Brooks* case, applied the same term to an

exercise by Congress of one of its granted powers for the purpose of preventing the spread of any evil or harm where he spoke of a Congressional exercise of the power to regulate commerce as an exercise of "the police power for the benefit of the public within the field of interstate commerce". It is well established in the decisions of this Court that the police power is not, as sometimes claimed, limited to the making of regulations for the promotion merely of such matters as health, morals and safety. As this Court has many times said, it "embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety." *C. B. & Q. R. Co.* v. *Drainage Commissioners,* 200 U. S. 561, at 592; *Eubank* v. *Richmond,* 226 U. S. 137, at 142; *Sligh* v. *Kirkwood,* 237 U. S. 52, at 59.

If, therefore, in the language of Mr. Chief Justice Taft, Congress by a regulation of interstate commerce may "exercise the police power for the benefit of the public within the field of interstate commerce" and if the police power extends to the promotion of the public convenience or the general prosperity, it would seem clear that an exercise of the commerce power is not made invalid by the fact that one of its objectives may be to improve conditions in one of the great basic industries of the nation and thereby enhance the ability of that industry to render its indispensable service to the community.

This Court elsewhere in speaking of "the police power of the National Government" has held that there is a "public national interest", and that "a business affected with a public national interest * * * is subject to national regulation as such". (*Chicago Board of Trade* v. *Olsen,* 262 U. S. 1, at 41.) Of course, that regulation must take place through one of the constitutionally granted powers, *e. g.* the power to regulate interstate commerce. Certainly, however, it is new constitutional doctrine to urge, as petitioner does, that an exercise of the granted power to regulate commerce is made invalid if its effect is, as petitioner contends, to subject to national regulation an industry like the bituminous coal industry, which on a national scale presents all the characteristics held in *Nebbia* v. *New York, supra,* to constitute affectation with a public interest. See *infra,* pp. 162 to 164.

B. THE PRICE REGULATION PROVISIONS OF THE ACT ARE LIMITED TO SALES IN OR DIRECTLY AFFECTING INTERSTATE COMMERCE, AND ARE THEREFORE WITHIN THE POWER OF CONGRESS

The provisions of the Bituminous Coal Conservation Act relating to price regulation are to be found in Part II of Section 4 of the Act, the section which embodies the Bituminous Coal Code.

The code is introduced by a paragraph which reads as follows:

> For the purpose of carrying out the declared policy of this Act, the code shall contain the following conditions, provisions and

obligations which will tend to regulate interstate commerce in bituminous coal and transactions directly affecting interstate commerce in bituminous coal.

The provisions of the code, those relating to price regulation as well as those relating to other matters, must be read in the light of this introductory paragraph prefixed to them. The words of the paragraph describe the provisions and obligations of the code as those which will tend to regulate interstate commerce and transactions directly affecting interstate commerce. In the light of this language the sales to which the price regulatory provisions of the Act found in the code are meant to apply must be construed to be sales in interstate commerce and sales directly affecting that commerce.

That the Act is to be construed as thus limited in application to transactions which can be reached by federal power follows not merely from the plain import of the language just quoted, but from general canons of statutory construction. Should any doubt as to meaning of the language be raised because of the use of the phrase "which will tend to regulate" instead of "for the regulation of", the construction above indicated is compelled by the long established rule that if a statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional or of doubtful constitutionality and by the other valid, the Court

will adopt that construction which will save the statute from constitutional infirmity. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 407; *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339; *Ann Arbor R. Co.* v. *United States*, 281 U. S. 658; *United States* v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77.

Furthermore, the Act provides in Section 3:

> No producer shall by reason of his acceptance of the code provided for in section 4 or of the drawback of taxes provided in section 3 of this Act be held to be precluded or estopped from contesting the constitutionality of any provision of said code, or its validity as applicable to such producer.

This provision clearly contemplates that should an effort ever be made to apply the provisions of the Act to a situation over which congressional power may not be validly exerted, the individual affected shall have opportunity to contest the constitutionality of such attempted application, as, *e. g.*, to a transaction not directly affecting interstate commerce. Under this provision, a producer who makes a sale which is not in interstate commerce or which does not directly affect interstate commerce is enabled to establish judicially that the regulation can not be validly applied to such a sale. Opportunity to assert such a contention is given in the proceedings for judicial review of the orders of the Commission in Section 6 of the Act.

In the light of the fact that the operation of the Act is expressly directed to transactions in or directly affecting interstate commerce, and that a way is provided for producers to remove themselves from the operation of the Act by establishing in a proper case that it is constitutionally inapplicable to the transactions to which in their case it is sought to be applied, neither the *Trademark Cases,* 100 U. S. 82, nor the *Employers' Liability Cases,* 207 U. S. 463, cited by petitioner (Br. p. 89) is in point. The statutes involved in those cases purported to draw no distinction whatever between transactions in interstate and in intrastate commerce.

In the present case the statute is expressly directed to transactions in or directly affecting interstate commerce. There is no doubt that Congress intended to apply the regulations of the Act up to the limits of its constitutional power and no farther. For this reason, it included not merely interstate commerce but also transactions directly affecting interstate commerce. The Act will, of course, thus require judicial examination and interpretation in particular cases to determine the constitutional applicability of its provisions to those cases; but so do the Sherman Act, the Federal Trade Commission Act, the Second Employers' Liability Act, and many other congressional regulations enacted under the commerce power.

Congressional power under the commerce clause may validly regulate not merely transactions *in*

interstate commerce, but also transactions in intrastate commerce to the extent that these *directly affect* interstate commerce. *United States* v. *Ferger,* 250 U. S. 199; *Board of Trade* v. *Olsen,* 262 U. S. 1. There can be no doubt, therefore, that the price-fixing provisions of the Bituminous Coal Conservation Act may be constitutionally applied not merely to interstate sales of bituminous coal, including sales f. o. b. mine for interstate shipment, but also to intrastate sales which directly affect interstate sales.

It appears from the record that at least in all the important producing areas, because of the way in which bituminous coal is marketed, the prices made in the bulk of the intrastate sales have a direct and immediate effect upon the price in interstate sales. Furthermore, such is the relationship in the large majority of transactions between the two sets of prices, that a regulation of interstate prices can be defeated by the prices made in the intrastate transactions. Thus the court below found:

> The distribution and marketing of bituminous coal within the United States is predominantly interstate in character, and the interstate distribution and sale of such coal are so intimately and inextricably connected, related and interwoven that the regulation of interstate transactions of distribution and sale cannot be accomplished effectively without discrimination against interstate

> commerce unless transactions of intrastate distribution and sale be regulated. (Fg. 175, R. 209.)

The court below also found that:

> If coal produced and sold for use in the state of production were sold at lower mine prices resulting in delivered prices lower than comparable coal produced outside the state shipments of such coal into the state would be diminished and intrastate shipments of coal within the state would be increased. (Fg. 52, R. 134.)

The petitioner stipulated that the government witnesses would testify that, as to all areas of substantial production:

> The competitive situation is such that the effect upon intrastate sales resulting from a minimum-price regulation for interstate sales, if such regulation were not applied to intrastate sales, would be to give such a competitive advantage to the intrastate seller that the interstate seller could not fairly compete with him, so that there would result a discrimination against the interstate seller. (R. 376.)[1]

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[1] The second paragraph of this stipulation reads:

"That the other Government producer witnesses would each make the same answer in respect of the producing and marketing territories as to which they testified and as to the other areas of substantial production throughout the country to which they testified."

It is obvious that the words "to which they testified" at the end of this paragraph have no meaning as they stand,

Petitioner made no attempt to introduce any evidence to controvert this statement.[1]

Thus the Record bears out the finding in the Report of the Committee on Ways and Means of the House of Representatives that:

> No effort at regulating interstate commerce in bituminous coal or stabilizing its interstate markets can ignore the factor of domestic production and distribution. Some of the coal producing states have no domestic markets. Some of the States with the largest consumption also produce coal. The effect of this domestic production on the interstate marketing of coal, and therefore, on its interstate commerce is direct and, to a large extent, controlling. (H. R. 1800, 74 Cong., 1st Sess., p. 2.)

Under these circumstances it is submitted that if Congress may regulate the price of coal sold in interstate commerce, it may also, in order to pro-

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and that the only reasonable interpretation of the paragraph is that Government witnesses would make such an answer as to all areas of substantial production.

[1] Petitioner now attempts to supply the defect in his case by pointing out that in some states only a small proportion of the coal produced or of the coal consumed moves in interstate commerce. (Petitioner's Brief, pp. 42–45.) But this in no way affects the conclusion, amply established in the Record, that if the price of interstate sales were regulated and the price of intrastate sales not regulated, the result would be injury to the interstate sales. The contention of petitioner means merely that a smaller volume of interstate commerce would be injured in such cases than in the usual case of most coal-producing States.

tect interstate commerce in coal from injury by way of adverse discrimination, regulate intrastate sales of coal subject to the right of any affected producer to show as a matter of constitutional right in any questioned transaction that the price which is charged in that transaction did not directly affect interstate commerce. The congressional power to regulate prices in intrastate sales in order to protect the prices fixed in interstate sales is precisely the same power as the power to regulate rates in intrastate transportation in order to protect the rates fixed in interstate transportation. In other words where the relationship between the price of coal sold locally and the price of that sold in interstate commerce is such that the effect of the local on the interstate is direct, settled principles establish that this relationship is subject to the control of the Federal Government. *Houston, East & West Texas R. Co.* v. *United States* (Shreveport Case), 234 U. S. 342; *Wisconsin Railroad Comm.* v. *Chicago, B. & Q. R. R. Co.*, 257 U. S. 563; *Colorado* v. *United States*, 271 U. S. 153.

The discrimination against the interstate seller from lower delivered prices on intrastate coal resulting from lower mine prices for such coal would have precisely the same effect upon interstate commerce as that resulting from lower intrastate freight rates described by this Court in *Ohio* v. *United States*, 292 U. S. 498. There, that half of the intrastate delivered price of coal which was al-

locable to freight was lowered by State authority and it was found that interstate commerce was prejudiced thereby. If the other half of the same price—that allocable to the mine price—were lowered, the effect upon the delivered price and upon interstate commerce would be exactly the same. Since it appears that practically all intrastate sales of coal are directly competitive with interstate sales, it follows that all sales of coal come potentially within the Federal regulatory power, subject to the right to show in any particular instance that the intrastate price does not directly affect the interstate price.

This can be none other than the meaning of Congress with respect to sales in its declaration in Section 1 of the Bituminous Coal Conservation Act that "all * * * distribution by the producers [of bituminous coal] bear[s] upon and directly affect[s] its interstate commerce and render[s] regulation * * * imperative for the protection of such commerce." These words, appearing in a section of the Act which is in the nature of a preamble, are an expression of what was deemed by Congress to be a factual relationship, and indicate the legislative conclusion that potentially all sales of coal come within the regulations of the statute. However, by the provision already quoted from Section 4, Congress plainly expressed its intention that where in a particular case the factual relationship might be

proved not to exist, the affected producer, through asserting and establishing his constitutional right, may remove himself from the operation of the regulation.[1]

[1] Petitioner contends that the inclusion of "captive coal" in the Act indicates an intention that the regulatory features of the Act should apply to all coal produced. Captive coal is coal produced from mines owned or controlled by companies which themselves consume a substantial part of the output of these mines. The reason for the inclusion of captive coal is obvious. Petitioner himself has forcefully stated the necessity therefor. At the trial in the court below he testified:

"It has been the experience of the coal industry that large consumers will buy and operate their own mines when the price of coal becomes so high that it is more profitable to them to produce at controlled mines the tonnages required by them. This is a substantial element in competition with coal producers such as Carter Coal Company because the users of coal who do operate captive mines and who, upon a rise in the coal market, would acquire and operate them are the largest customers of the commercial producers. As their business is lost, further pressure is exerted on an already declining market for coal." (R. 264–265.)

Petitioner states in his brief (p. 12) that producers of captive coal are not engaged in commerce in coal in any sense. This is true only in those cases where a mine is owned by the consuming company and the coal produced in that mine is consumed in the State of production. In such cases the producer could successfully claim exemption from the regulatory provisions of the Act under Sections 3 and 6. Where, however, the mine is owned by a subsidiary company of the consuming company, or the coal is consumed in a State other than the State of production, the Act would apply to the extent that the transactions in question directly affect the interstate commerce of competing commercial companies.

If it should be urged that regulation of prices in interstate commerce by the Federal Government cannot be constitutional because it would logically require, as above indicated, the regulation of many intrastate prices and thus would subject a large part of the economic life of the State to Federal control, there are two answers:

In the first place, it is to be noted that the scope of Federal power thus established over prices in intrastate sales under the commerce power is restricted to the very limited category of commodities over which governmental price regulation may be exercised consistently with the due process clause of the Fifth Amendment.

In the second place, the Federal power thus established reaches no farther than transactions which directly affect interstate commerce, which transactions have repeatedly been declared to be subject to Federal control. Any contention that would deny this established power because its exercise may extend to matters otherwise within State supervision is one that is directly opposed to the principles of constitutional construction declared and applied in such cases as *Ruppert* v. *Caffey*, 251 U. S. 264, and *Everard's Breweries* v. *Day*, 265 U. S. 545. These cases afford full recognition to the principle that whenever it is necessary, in order

effectually to implement an exercise of power granted to the Federal Government—of which the power to regulate sales in interstate commerce is surely one—Federal power may be exerted to reach all transactions whose regulation is reasonably deemed by Congress appropriate to the effective exercise of the granted power. In *Everard's Breweries* v. *Day, supra,* this Court said (pp. 558–560):

> If the Act is within the authority delegated to Congress by the Eighteenth Amendment, its validity is not impaired by reason of any power reserved to the States . . . And if the Act is within the power confided to Congress, the Tenth Amendment, by its very terms has no application, since it only reserves to the states powers not delegated to the United States by the Constitution. . . . The Constitution confers upon Congress the power to make all laws necessary and proper for carrying into execution all powers that are vested in it. In the exercise of such non-enumerated or implied powers it has long been settled that Congress is not limited to such measures as are indispensably necessary to give effect to its express powers. It is likewise well settled that where the means adopted by Congress are not prohibited and are calculated to effect the object entrusted to it, this Court may not

> inquire into the degree of their necessity. . . . Congress under its express power to enforce by appropriate legislation the prohibition of traffic in intoxicating liquors for beverage purposes may adopt any eligible and appropriate means to make that prohibition effective. The possible abuse of a power is not an argument against its existence. It has been held that the power to prohibit traffic in intoxicating liquors includes as an appropriate means of making that prohibition effective the power to prohibit traffic in similar liquors, although non-intoxicating. . . . *Ruppert* v. *Caffey*, 251 U. S. 264.

It must be re-emphasized that the power exerted in the Bituminous Coal Conservation Act stops at transactions directly affecting interstate commerce. If it be argued that this power, restricted as it is to transactions directly affecting interstate commerce and to the limited class of commodities over which governmental price control may be exercised, nevertheless exceeds the constitutional grant, this position can only be founded on reasoning directly opposed to the reasoning of the Court in the passage just quoted and amounts to an assertion that expressly granted powers are to be restricted because they may be exercised in important and far-reaching ways. Surely, to hold that the existence of a constitutional power is to be denied because the power is such that its exercise may be important and far-reaching is to establish a new canon of constitutional construction.

C. THE PROVISIONS OF THE ACT RESPECTING REGULATION OF PRICES ARE REASONABLE REGULATIONS AND INVOLVE NO INFRINGEMENT OF THE RIGHTS GUARANTEED BY THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

The fact that Congress has power under the commerce clause to regulate prices in interstate transactions and transactions directly affecting interstate commerce does not mean that Congress, in the exercise of such power, may regulate the price of shoes, candy, clothing, tobacco, toys, and all commodities generally, for there are always the limitations of due process upon governmental price regulation to be considered.

It is settled law that price regulation by governmental power is restricted by the constitutional requirement that property shall not be taken without due process of law. The Fifth Amendment imposes the requirement of due process upon exercises of Federal power in precisely the same way that the Fourteenth Amendment imposes it upon exercises of State power. It is well-established that under the Fourteenth Amendment the governmental power of the States does not extend to the regulation of all prices generally, for this would involve an unwarranted interference with the constitutional guaranty of freedom of contract, but only to such price regulation as constitutes a reasonable and appropriate means of protecting and promoting the public interest.

Just as price regulation by the States is limited to this scope by the due process clause of the Four-

teenth Amendment, so price fixing by the Federal Government under the commerce power is likewise limited by the due process clause of the Fifth Amendment. The parallelism between the relation of the Fourteenth Amendment to State power and of the Fifth Amendment to Federal power has recently been stated by this Court in *Nebbia* v. *New York,* 291 U. S. 502, a case which concerned price fixing by a State. The language of the Court is as follows (pp. 524–525):

> Thus has this court from the early days affirmed that the power to promote the general welfare is inherent in government. Touching the matters committed to it by the Constitution, the United States possesses the power, as do the states in their sovereign capacity touching all subjects jurisdiction of which is not surrendered to the federal government, as shown by the quotations above given. These correlative rights, that of the citizen to exercise exclusive dominion over property and freely to contract about his affairs, and that of the state to regulate the use of property and the conduct of business, are always in collision. No exercise of the private right can be imagined which will not in some respect, however slight, affect the public; no exercise of the legislative prerogative to regulate the conduct of the citizen which will not to some extent abridge his liberty or affect his property. But subject only to constitutional restraint the private right must yield to the public need.

> The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.

The Court further stated with respect to the power of government to fix prices:

> There can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells. * * * Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty. (*Ibid,* pp. 537, 539.)

The picture of the bituminous coal industry presented in the Record in this case and summarized at the beginning of this Brief, indicates the great importance of the industry in the economic life of the Nation, and demonstrates that the remedy

adopted by Congress to deal with the evils which admittedly afflict the industry is one which, in the language of this Court just quoted, "is not unreasonable, arbitrary or capricious" but has "a real and substantial relation to the object sought to be attained." The Record also demonstrates a truly remarkable parallelism between the material conditions found by the court below to exist in the bituminous coal industry and those facts of the milk industry which were specifically singled out and adverted to by this Court in the *Nebbia* case as constituting the considerations which made price fixing for that industry a reasonable and hence legitimate exercise of governmental power and consistent with due process. The following comparison in parallel columns amplifies that made by the court below in its oral opinion (R. 1193–1195).

Milk Industry	*Coal Industry*
1. "During 1932 the prices received by farmers for milk were much below the cost of production." (291 U. S. 515.)	1. Coal prices have been below the cost of production for years (Fg. 179, R. 210).
2. "The decline in prices during 1931 and 1932 was much greater than that of prices generally." (291 U. S. 515.)	2. The decline of coal prices at the mine since 1923 has been much greater than that of commodities prices generally (Fg. 100, R. 163–164).
3. "The situation of the families of dairy producers had become desperate and called for state aid similar to that afforded the unemployed, if conditions should not improve." (291 U. S. 515.)	3. The condition of coal miners and their families has long been desperate (Fg. 142, R. 193).

Milk Industry	*Coal Industry*
4. "Milk is an essential item of diet." (291 U. S. 516.)	4. "Coal is certainly essential for the carrying-on of our commerce and the industrial activities of the country, as well as for domestic heating." (R. 1194; Fgs. 42–43, R. 129–130.)
5. "Failure of [milk] producers to receive a reasonable return for their labor and investment over an extended period threaten a relaxation of vigilance against contamination." (291 U. S. 517.)	5. This, of course, is not true of coal. But to counterbalance this is the great waste of coal in mining operations which results from the failure of coal producers to receive a reasonable return (R. 162–164, R. 204–205).
6. "The production and distribution of milk is a paramount industry of the state, and largely affects the health and prosperity of its people. * * * Curtailment or destruction of the dairy industry would cause a serious economic loss to the people of the state." (291 U. S. 517.)	6. The trial court found that "the destruction of the [coal] industry * * * would cause serious economic loss to the entire country and * * * a very serious interference with all commerce."
7. Among the causes for low prices for milk are: "a periodic increase in the number of cows and in milk production; * * *." (291 U. S. 517.)	7. This court is familiar with the chronic condition of overcapacity in the coal industry which forces prices down (Fgs. 57–58, R. 137–138) (*Appalachian Coals, Inc.*, v. *United States*, 288 U. S. 344, 361).
8. "the prevalence of unfair and destructive trade practices in the distribution of milk, leading to a demoralization of prices in the metropolitan area and other markets; * * *." (291 U. S. 517.)	8. The existence of trade practices demoralizing the coal industry was discussed in the *Appalachian* case, *supra*, at 362–363. See Fgs. 50, 166, 181, R. 133–134, 207–210.
9. "and the failure of transportation and distribution charges to be reduced in proportion to the reduction in retail prices for milk and cream." (291 U. S. 517.)	9. This is even more important for coal than for milk, since over 50% of the delivered price of coal consists of transportation charges which have not been reduced (Fg. 67, R. 142).
10. The need for a surplus milk supply to meet day to day and seasonal demands, combined with the	10. The seasonal demand for coal, plus inability to store coal, keeps sufficient mines in operation

Milk Industry	*Coal Industry*
inability to store milk, causes price cutting. (291 U. S. 517–518.)	to satisfy the winter peak demand, and this is in part responsible for the tremendous overcapacity which depresses prices (Fgs. 49, 57, R. 132–133, 137).[1]
11. "unrestricted competition aggravated existing evils, * * *." (291 U. S. 530.)	11. The trial court found: "Said competitive conditions have caused the insolvency of very many coal producers, the abandonment of a great many mining properties before they were completely worked out with a consequent waste of coal resources, repeated and substantial reductions in wage rates, and, unless corrected, threaten to destroy the solvency of a great many of the existing operators and the premature abandonment of many of the existing mines." (Fg. 185, R. 212.)
12. "the normal law of supply and demand was insufficient to correct maladjustments detrimental to the community." (291 U. S. 530.)	12. The maladjustment in the coal industry was not corrected during 12 years of unregulated competition. The court below found expressly that "It is probable that the operation of the law of supply and demand will not serve to eliminate the destructive competitive conditions." (Fg. 185, R. 212.)

Petitioner attempted, in the court below, to limit the effect of the *Nebbia* case in determining the considerations which serve to make price-fixing conform to due process by urging that that case rests solely on the power of the States to protect

[1] The trial court found: "Surplus capacity is partly due to the necessity of maintaining capacity sufficient to meet the seasonal peak of demand in winter and partly to over-development above and beyond the requirements of the seasonal peak. * * * The surplus capacity which must be maintained to meet the seasonal peak is one of the causes of the intense competition in the industry, as the operator is under pressure because of continuing fixed charges to try to sell during off-season. * * *" (Fg. 57, R. 137.)

the public health. Although health was one of the factors involved, it was but one of many and was clearly not the sole or major basis of the decision. In any event, and altogether apart from the special and parallel economic conditions in the two industries, coal resembles milk in being one of the basic necessities of life, essential to health and work, and the power of governmental authority to deal with coal as such a basic necessity and therefore vital to the public interest was recognized by this Court long before the *Nebbia* case. *Jones* v. *City of Portland,* 245 U. S. 217.

Petitioner further contended that the *Nebbia* case is inapplicable because it affirmed an exercise of State and not of Federal power. The Government does not rely upon the case to establish the basis for the power of the Federal Government to regulate prices. That basis exists in the commerce clause. The *Nebbia* case was concerned, not with the basis of State power, which is not a Federal question, but with the issue whether or not the particular exercise of State power transgressed a limitation imposed by the Federal Constitution, namely, the due process clause of the Fourteenth Amendment. It is accordingly authority for the extent to which the due process clause sanctions or limits governmental power to regulate prices. Clearly, the due process clause of the Fifth Amendment imposes no greater restriction upon Federal power than the due process clause of the Fourteenth Amendment imposes upon State power.

The *Nebbia* case has ruled that those limitations do not operate to invalidate governmental price fixing when applied to such facts and conditions as are characteristic of the milk industry and the coal industry.

In his brief for this Court petitioner does not contend that price-fixing is *per se* a violation of the due process clause. Instead he argues that the fixing of minimum prices is confiscatory because such prices tend to become the maxima (Br. p. 258); that arbitrary power is given to his competitors (*i. e.* the district board) to fix prices (Br. p. 260); and that the price-fixing provisions are invalid because the prices of competing fuels such as oil and gas are not also regulated (Br. pp. 261 ff.). The argument that the fixing of minimum prices constitutes confiscation was rejected by this Court in *Hegeman Farms Corporation* v. *Baldwin,* 293 U. S. 163. The contention that the statute gives power to the competitors of petitioner arbitrarily to fix prices is based on a plain misconstruction of the statute as will be shown elsewhere. The price-fixing authority is the Commission, a governmental body (see *infra,* pp. 170 to 171). No serious weight could be given to the argument that the statute is invalid because Congress has not attempted to fix the prices of competing fuels. Such a contention would have made federal regulation of the railroads unconstitutional because water transportation and motor trucks and motor busses were not regulated.

Petitioner is thus reduced to contending that the entire statute is made unconstitutional under the due process clause because it combines a number of restrictions on the freedom of contract. (Br. pp. 244 ff.) In other words, even if each of these restrictions is reasonable, the sum of them becomes *ipso facto* unreasonable because these restrictions are combined in one statute. It is hard to see why the combination of valid provisions should become invalid merely by reason of the combination. If this contention were true the Interstate Commerce Act and the related acts regulating the railroads would be unconstitutional merely because they contain manifold restrictions on the liberty of the carriers.

D. THE MECHANISM FOR THE DETERMINATION OF PRICES IS REASONABLE AND DOES NOT INVOLVE AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE POWER

The procedure provided in the Act for determining minimum prices is detailed, because of the nature of the subject matter and the obvious desire of Congress that these minimum prices should be fixed on as complete a factual basis as it is possible to obtain and that they should not involve hardship on any producer or district. The primary standard to which the prices must conform is that taken in the aggregate they shall yield an average return per ton for each district as nearly equal as may be to the weighted average cost per ton of the

production of the minimum price area in which the district is located. Specific prices must conform to the following standards: they must be just and equitable, must reflect as nearly as possible the relative market value of the various kinds, qualities and sizes of coals, must not be unduly prejudicial or preferential as between districts, and must afford to the producers in the several districts substantially the same opportunity to dispose of their coals on a competitive basis as has heretofore existed. The procedure for arriving at prices based upon these standards is briefly as follows: Each district board first determines the weighted average cost of the coal produced within the district in 1934, and adjusts this figure to give effect to subsequent changes in factors substantially affecting costs. The district boards then transmit to the Commission the cost figures so ascertained and the computation on which they are based. The Commission thereupon computes the weighted average cost for each minimum price area, which it in turn transmits to the district boards. Upon the basis of the cost figure of the minimum price area in which the particular district is located the district boards draw up a schedule of minimum prices applicable to the various kinds, quality and sizes of coal produced in the district. These schedules are to be submitted to the Commission which may approve, disapprove or modify them.

The various district boards must then coordinate the prices, subject to rules and regulations prescribed by the Commission; that is to say, these prices are to be so adjusted that the coal producers in the different districts will be afforded substantially the same opportunity to dispose of their coal upon a competitive basis as has heretofore existed. These coordinated prices, together with the data upon which they are predicated, are then to be submitted to the Commission which may approve, disapprove or modify them.

Few statutes involving delegated power have circumscribed administrative discretion within the limits of such detailed instructions. This Court has frequently upheld statutes which contain far less definite standards. See *New York Central Securities Corp.* v. *United States,* 287 U. S. 12, 24 (in the public interest); *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.,* 289 U. S. 266, 285 (public convenience, interest or necessity); *Avent* v. *United States,* 266 U. S. 127, and *United States* v. *Chemical Foundation,* 272 U. S. 1 (in the public interest); *Colorado* v. *United States,* 271 U. S. 153, 168, and *Chesapeake and Ohio Railway* v. *United States,* 283 U. S. 35, 42 (certificates of public convenience and necessity); *Tagg Bros. and Moorhead* v. *United States,* 280 U. S. 420 (just and reasonable commissions); *Wayman* v. *Southard,* 10 Wheat. 1 (in their discretion deem expedient); *Buttfield* v. *Stranahan,* 192 U. S. 470 (purity,

quality, and fitness for consumption); *Union Bridge Co.* v. *United States,* 204 U. S. 364 (unreasonable obstruction to navigation); *Mahler* v. *Eby,* 264 U. S. 32 (undesirable resident).

In view of these decisions, we can see no basis for petitioner's contention that the detailed and comprehensive provisions for price regulation here involved delegate legislative authority "without a standard" (Pet. Br. p. 236).

Petitioner contends that the minimum price provisions of the statute are invalid as delegating power to fix prices, not to a public body, the Bituminous Coal Commission, but to private persons, namely, district boards which are composed of coal producers elected by code members with an additional labor representative chosen by employees, within the district. This contention rests on a plain misunderstanding of the statute. It is clear on the face of the statute that the minimum prices have binding legal effect only by virtue of action by the Commission; that while the district boards "may advise and recommend, they are powerless to coerce" (*Daty* v. *Love,* 295 U. S. 64, 70).

Under subsection (a) of Part II, Section 4, the schedules of minimum prices established by any district board, together with the data upon which they are computed, must be submitted to the Commission, "which may approve, disapprove, or modify the same to conform to the requirements of this subsection, *and such approval, disapproval, or mod-*

ification shall be binding upon all code members within the district," subject to such changes as result from the coordination provided for in subsection (b). Subsection (b) directs the district boards to coordinate in common consuming markets prices so established under subsection (a) and to submit these coordinated prices to the Commission, "which may approve, disapprove or modify the same * * * *and such approval, disapproval,* or modification shall be binding upon all code members within the *affected districts."* Subject to certain exceptions, subsection (e) makes it a violation of the code to sell or deliver coal, or to contract to sell or deliver coal, at a price below the minimum *"approved or established by the Commission."*

The task of regulating the minimum prices of bituminous coal in sales in or affecting interstate commerce is obviously one of extreme complexity. So, however, is the task of regulating all the railroad freight rates in or affecting interstate commerce. Petitioner refers to the fact that in the area corresponding to Minimum Price Area No. 1, established by the present statute, 27,000 sizes, varieties, and prices of coal were found to exist in a recent period. The number of individual freight rates subject to determination by the Interstate Commerce Commission runs to many times that figure and yet that Commission has not found its task an impossible one, and the courts have not held

that the complexity of the task affords reason for regarding the Interstate Commerce Act as unconstitutional. Indeed, the very complexity of the task has been recognized as ground for committing its performance to an administrative agency with broad discretionary powers. See *Hampton & Company* v. *United States,* 276 U. S. 394, 407.

Petitioner's major attack upon the provisions of the Act which establish the mechanism for price regulations is that those provisions will, in effect, operate to "freeze" the distribution, as between States, of the production and sale of bituminous coal in the proportions which now obtain and that to that extent the Act amounts to a Congressional control of production. The argument that such is the purpose and effect of the statute rests on a misreading of its terms. It is put by petitioner on those provisions which deal with the coordination of minimum prices as between different producing areas and, more specifically, upon the provision of subdivision (b), Part II of Section 4, to the effect that coordination shall take account of certain factors "to the end of affording the producers in the several districts substantially the same opportunity to dispose of their coals upon a competitive basis as has heretofore existed." (Pet. Br. p. 91.)

Obviously the plain import of this language is not to guarantee to the producers of each district the proportion of business elsewhere which they now

have, but merely to keep open to them their opportunity to continue to compete upon the same basis as hitherto. In view of the fact that there is already the widest possible distribution of coal by the different producing States to other States (see map, Def. Ex. 10, R. 1015), this mandate to the price-fixing authority is a guarantee of a full measure of reasonable competition between districts rather than in any way a restriction thereon. It is to be noted that the language above quoted does not provide, as petitioner seems to assume, that prices are to be so coordinated that the producers of a given area shall not be able to sell in other markets more than the quantities that they have hitherto sold, but, on the contrary, expressly preserves to them the opportunity to compete as they now are doing. Attention should also be called to the fact that if any producer or district board is dissatisfied with the coordination of prices, complaint may be made to the Commission for revision thereof and the Commision, after notice and hearing, shall make a new order to remove any prejudice to which any district may be subjected with respect to the fair opportunity to market its coal.[1]

[1] "On the petition of any district board or other party in interest or on its own motion, after notice to the district boards, the Commission may at any time conduct hearings to determine whether the foregoing method of fixing minimum prices under subsection (a) is prejudicial to any district with respect to the fair opportunity of such district to mar-

The contentions advanced by petitioner with regard to the operation of the price-fixing provisions of the Act are at the present time and in this proceeding purely speculative. Ample opportunity exists under the terms of the statute to question them or their applicability to a particular controversy when such controversy shall actually arise. The provisions are complicated, largely as a result of the obvious legislative intent to leave less to the discretion of the Bituminous Coal Commission than

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ket its coal. Should the Commission so find, and further find that the prejudice cannot be removed through the coordination of minimum prices as provided for in this subsection (b), then the Commission may establish a different basis for determining minimum prices in such district, to the end that fair and competitive prices shall prevail in the marketing of the coal produced in such district: *Provided*, That the minimum prices so established as to any such district shall yield a return, per net ton, not less than the weighted average of the total costs, per net ton, of the tonnage of such district." (Section 4, Part II, subdivision (b).)

"If any code member or district board, or any State or political subdivision of a State, shall be dissatisfied with such coordination of prices or rules or regulations, or by a failure to establish such coordination of prices or rules or regulations, or by the maximum prices established for him or it pursuant to subsection (c) of this section, he or it shall have the right by petition, to make complaint to the Commission, and the Commission shall, under rules and regulations established by it, and after notice and hearing, make such order as may be required to effectuate the purpose of subsections (b) and (c) of this Section * * *." (Section 4, Part II, subdivision (d).) It is to be noted that under the provisions of Section 6 of the Act all orders of the Commission are subject to review at the suit of any party or interest in the Circuit Court of Appeals of the United States or in the United States Court of Appeals for the District of Columbia.

is left, for example, to the Interstate Commerce Commission by the provisions of the Interstate Commerce Act. The Interstate Commerce Commission has the broadest possible power to fix particular rates with no other guide than a general requirement of reasonableness. In the exercise of this almost untrammeled discretion, the Commission has made orders which have vitally affected the economic well-being of whole communities and have operated from time to time to cause the transfer of business from one place to another or else have prevented transfers which would otherwise have occurred. In connection with petitioner's contention that the provisions of the present statute are invalid because they may operate to maintain distribution in existing channels, it is interesting to note that one of the familiar policies applied by the Interstate Commerce Commission in the fixing of rates is to preserve existing equality of opportunity. *Anaconda Copper Mining Co.* v. *Director General,* 78 I. C. C. 549, 552; *Morrell & Co.* v. *N. Y. Central R. Co.,* 104 I. C. C. 104, 124; *City Council of Atchison* v. *Missouri Pacific Ry. Co.,* 12 I. C. C. 111, 114. The power of the Interstate Commerce Commission thus to affect the course of economic development is apparently not questioned by petitioner. Indeed, the suggestion has been made that supposed objectives of the present Act could be validly attained through the use of the powers of the Interstate

Commerce Commission. If the use of the commerce power is competent to attain those objectives through the regulation of transportation, there is no constitutional basis for arguing that the same objectives cannot be attained through the action of a commission like the Bituminous Coal Commission, to which is committed the regulation of the other great branch of commerce—viz, sales and distribution.

E. PETITIONER'S ARGUMENTS BASED (1) UPON THE SUPPOSED DANGERS AND DIFFICULTIES INCIDENT TO THE EXISTENCE OF A CONGRESSIONAL POWER TO REGULATE THE PRICES OF BITUMINOUS COAL IN TRANSACTIONS IN OR DIRECTLY AFFECTING INTERSTATE COMMERCE, AND BASED (2) UPON THE HISTORICAL CONTENTION THAT SUCH A POWER WAS NOT INTENDED TO BE GRANTED TO CONGRESS AT THE TIME THE CONSTITUTION WAS ADOPTED, ARE NOT WELL FOUNDED

1. *The Practical Argument as to Dangers and Difficulties is not well-founded.*

Throughout his brief, petitioner is continually suggesting the difficulties and dangers which he contends would be incident to congressional price regulation. Sometimes these suggestions seem directed towards specific provisions of the statute now before the Court, sometimes towards congressional price regulation in general. Insofar as they relate to specific provisions, some of them have already been answered in the preceding section of this brief dealing with the mechanism for price

determination set up by the Act. No statute can be so complete or specific as to exclude from the outset all doubt and uncertainty regarding the way in which its provisions will be applied in particular cases, or regarding the effect which such application may have upon particular interests.

When power to regulate railroad rates was conferred upon the Interstate Commerce Commission, subject to no other statutory direction than that the rates should be reasonable, it would have been possible to draw an even more terrifying picture of the complexity of the task and of the way in which the power might be abused by the Commission than petitioner now draws in his account of the difficulties presented by the Bituminous Coal Conservation Act (Br. pp. 237–243). The only difference is that the Coal Act undertakes to spell out some of the complex steps in the process of price determination which the Interstate Commerce Commission has been left free to work out for itself without having attention called to them through their explicit inclusion in the statute. It may well be that some of the provisions of the Coal Act will prove difficult to administer in practice. Difficulty of administration is, however, not a constitutional vice, but a matter for legislative correction. It may even be that some of the provisions will work hardship upon individuals or localities. If that should prove to be the case, and if the hardship should be sufficient in

degree to amount to an invasion of constitutional right, the affected individual has full opportunity to make his claim in court and ultimately to bring it to this Court under Section 6 of the Act. Such questions are not, it is submitted, properly before the Court at this time. They remain in the the realm of speculation and anticipation. Where, in a proceeding like the present, the validity of an entire statute is questioned, before its operative effect upon any individual in any concrete case can be tested, care should be exercised to distinguish between those issues which go to the constitutionality of the Act as a whole and those which can only be properly determined in connection with the attempted application of some particular provision to a particular situation.

In certain respects, however, petitioner claims that the powers exercised by Congress in the Coal Act are in themselves, and without reference to the specific provisions of the statute, so dangerous as not to lie within the scope of the constitutional grant. His principal argument to this effect consists of an elaboration and extension of his contention, already answered in the immediately preceding section of this brief, that the purpose of the Act is to "freeze" production and distribution in their existing pattern (Pet. Br. 91–96). Having assumed that this is the purpose of the Act and having argued that because of that purpose, the

Act is unconstitutional, he returns to the same point at a later part of his brief (pp. 143–149) and argues that the Congressional power to regulate the prices of bituminous coal in transactions in or affecting interstate commerce necessarily carries with it such a power to allocate and "freeze" production and distribution and is, therefore, unconstitutional; and in support of this contention he propounds a number of hypothetical examples of exercise of such power, as, for instance:

> Possessing the power now claimed by the Government, Massachusetts, and its neighbors, securing a majority of the Congress to aid them, could have prevented the well known "shift" of cotton mills from the North to the South which was undertaken in recent decades on a large scale in order to take advantage of the lower labor costs obtaining in Georgia and the Carolinas consequent upon the lower cost of living in those states.
>
> Similarly, the growth of the automobile industry could have been halted in its tracks by prohibitory price control of interstate shipments of automobiles, upon the ground that interstate commerce in automobiles would "divert" or "dislocate" interstate commerce in horse drawn vehicles and in horses and mules, with consequent injury to the production of wagons, buggies, horses and mules,—a result which the Congress of that day might "reasonably" have regarded

> as opposed to the then general interests of the Nation at large.
>
> Upon like grounds, price regulations could be made today to ameliorate or altogether to destroy the competition of oil with coal, or vice versa. Nor need the use of price regulation of commodities moving in interstate commerce be limited to redistribution of the localities of production. Upon the same basic theory advanced to support the statute now at bar, price discriminations might also be made as between the interstate movement of various kinds of foodstuffs, upon the ground that it is for the Congress to say what it is for the general welfare of the Nation that the people should eat. Under this disguise, sumptuary laws (with which we have had recent unfortunate experience) could again be thrust upon us,—this time without constitutional amendment. (Pet. Br. 147–148.)

The suggestion that the power of Congress to enact the price regulations contained in the Coal Act would necessarily carry with it a power to enact such legislation as petitioner conjures up, and the argument that if Congress is without power to enact legislation of the latter kind, it is without power to regulate the price of bituminous coal in transactions in or directly affecting interstate commerce, are obviously without foundation. It is like suggesting that Congress cannot have power to exclude impure food and drugs from the channels

of interstate commerce, without having the further power to exclude allopathic drugs in favor of homeopathic, and that because it has not the latter power, it must be denied the former. All exercises of congressional power, including exercises of the commerce power, are obviously subject to the due process clause of the Fifth Amendment, as from time to time that clause is interpreted and applied by this Court, and exercises of power which are manifestly arbitrary, capricious and unreasonable will be held to transgress the limitation of due process. Just as it has been said that the power to tax is not the power to destroy while this Court sits, so it may be truly said that while this Court sits, the power to regulate is not the power to regulate arbitrarily, capriciously and for no reasonable end or purpose.

The validity of the price regulations contained in the Act now before the Court depends not merely upon whether they are an exercise of the commerce power, but also upon whether they are such a reasonable exercise of Governmental power as to satisfy the requirements of due process. That they are reasonable regulations in the light of the facts and conditions of the bituminous coal industry, of the problems to which they are addressed and of the evils for which they are put forward as attempted solutions, the Government has attempted to show in a previous section of this brief. On the other hand, hypothetical and imaginary statutes

are not directed toward meeting the fully proved and well understood distress of one of the limited number of essential basic industries of the nation, are not reasonably adapted towards any such end, and being therefore capricious and arbitrary, would clearly violate the Fifth Amendment. Such a conclusion is wholly irrelevant to the question whether the price regulations of the Act before the Court fall properly within the constitutional grant of the commerce power to Congress.

2. *The Historical Argument is not well-founded or sufficient.*

One of the longest of all the sections of petitioner's brief is addressed to supporting the proposition that "the history of the formation, adoption, and ratification of the Constitution and contemporary expositions thereof establish that the power now asserted" (viz. the power of Congress to fix prices in transactions in or directly affecting interstate commerce) "was not granted" (Br. pp. 152–182). Petitioner admits that "it is not a sound ground for denying the asserted scope of a power granted to say that it was not in the minds of the framers or ratifiers of the Constitution when it was framed and ratified" (Br. p. 152). This admission is obviously necessary in view of the recent statement of this Court that:

It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. *If* by the statement that what the Constitution meant at the time of its adoption it means to-day, *it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation.* It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning—"We must never forget that it is a *constitution* we are expounding" (*McCulloch* v. *Maryland,* 4 Wheat. 316, 407)—"a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs." *Id.,* p. 415. When we are dealing with the words of the Constitution, said this Court in *Missouri* v. *Holland,* 252 U. S. 416, 433, "we must realize that *they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters.* * * * The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago." (*Home Building & Loan Association* v. *Blaisdell,* 290 U. S. 398, at 442–443.)

With this passage, there must also be read the following from the opinion in *Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211, at 228:

> *The reasons which may have caused the framers of the Constitution to repose the power to regulate interstate commerce in Congress do not, however, affect or limit the extent of the power itself.*

In view of this language petitioner cannot hope to argue that the commerce power does not include the power to regulate sales of bituminous coal in or directly affecting interstate commerce merely because the framers of the Constitution may not have felt the need for regulating such sales or may not have contemplated that the commerce clause might be interpreted to include the power to make such regulations. Accordingly, petitioner is driven back on language used by Chief Justice Marshall in *Dartmouth College* v. *Woodward,* 4 Wheaton 518 at 644, from which counsel quote as follows (Br. p. 152):

> It is necessary to go further, and to say that, had this particular case been suggested, the language would have been so varied as to exclude it, or it would have been made a special exception.

In view of petitioner's contention, it seems advisable to quote the entire passage of which the sentence just given forms a part. Speaking of the clause of the Constitution which forbids the States

to impair the obligation of contract, Chief Justice Marshall said:

> It is more than possible that the preservation of rights of this description [i. e. rights granted to corporations by their charters] was not particularly in the view of the framers of the constitution, when the clause under consideration was introduced into that instrument * * *. It is not enough to say, that this particular case was not in the mind of the convention, when the article was framed, nor of the American people, when it was adopted. It is necessary to go further, and to say that, had this particular case been suggested, the language would have been so varied as to exclude it, or it would have been made a special exception. *The case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the constitution in making it an exception.*

The passage thus quoted obviously produces on the mind a different impression from that left by the particular sentence extracted from its context and transferred to petitioner's brief. The test of whether, had the particular case been suggested, the language would have been so varied by the founders as to exclude it, turns out to be whether or not there is something in the literal construction of the commerce clause so obviously absurd or mis-

chievous or repugnant to the general spirit of the instrument as to justify making a special exception of the power in question—viz, the power to regulate sales of bituminous coal in interstate commerce,—and to exclude the power to regulate such sales from the plain meaning of the words of the commerce clause.

The test laid down by Marshall is thus not a historical one at all, but rather one which calls for the construction of the Constitution in the light of current conditions, and of what today, in the eyes of those who expound the Constitution, must be regarded as so absurd or mischievous or repugnant as to justify a construction contrary to the plain meaning of the language of the Constitution. If, as this Court has repeatedly held, differences of opinion as to the wisdom or unwisdom of policy must be laid aside as lying within the field of legislative discretion, and if accordingly attention is focused upon that which is absurd or repugnant or mischievous upon *any* conception of legislative policy, whether it be a policy of *laissez faire* on the one hand or of controlled competition on the other, then clearly it seems impossible to say in the light of the record before the Court in this case, and in the light of the application of the due process clause considered above, that the regulation of the price of bituminous coal in sales in or directly affecting interstate commerce is so obviously absurd or mischievous or repugnant to the general spirit of the

instrument as to justify making it an exception from the plain words of the Constitution.

Accordingly, petitioner falls back on the purely historical argument and asserts that had the particular exercise of the commerce power here involved been suggested when the article was framed and adopted, it would not have been adopted, and the language would have been varied as to exclude it. Apparently convinced, however, of the impossibility of proving a negative proposition of this character, he accepts the burden of proving the broader affirmative that the power to regulate interstate commerce was conferred upon Congress for the sole purpose of preventing the states from imposing restraints against each other in respect of such commerce, and from this proposition is drawn the conclusion that, under the commerce clause, the power of Congress is limited to the prevention of such restraints.

The proposition itself is without foundation and even if well-founded, the conclusion would not follow.

Referring to the latter point first, even if it were well established that the only reason which induced the Federal Convention of 1787 to confer, and the people to ratify, the power of Congress over interstate commerce was to prevent the States from imposing restraints thereon, it is well settled by the decisions of this Court, as indicated in the passage above quoted from the *Addyston Pipe* case,

that "the reasons which may have caused the framers of the Constitution to repose the power to regulate interstate commerce in Congress do not affect or limit the extent of the power itself."

Petitioner, however, has not, it is submitted, been successful in showing that the only reason which led to the grant of the interstate commerce power to Congress, and the only purpose of the grant, was to prevent restraints upon such commerce by the states. All that he shows, and all that is capable of being shown, is that this was *a* reason, or *one* of the reasons, for the grant (Br., pp. 154–155, referring to 2 Farrand, Records of the Federal Convention, 308, and Federalist No. XLII), which no one denies. If, however, this had been the only purpose, it is impossible to understand why it was not expressed in the Constitution in the form of a specific limitation on the power of the States, such as the Constitution imposes in other instances, as, for example, in the clause forbidding the States to impair the obligation of contracts, and why, instead, a grant of affirmative power was conferred on Congress. Furthermore, even were it capable of proof that it was the only reason, still, under the language quoted from the *Addyston Pipe* case, it would not serve to limit the express affirmative language of the grant.

Petitioner adduces two additional arguments in support of his contention that the affirmative power granted to Congress to regulate commerce among

the States must be construed as limited to a negative power to restrain interference with such commerce by the States. The first of these is that the Convention considered, and either rejected, or failed to adopt, proposals to confer on the central government certain powers of control over the States (Br., pp. 156, 162). Thus, he points out that the Convention refused to give to the Federal Government a power to negative laws of the States which, in the opinion of the national legislature, violated the Federal Constitution. Clearly, this evidence is inconclusive one way or the other as to the affirmative or negative character of the commerce clause. It may just as well be argued that the Convention declined to give this additional power to the Federal Government because it wished to confer wide powers under the commerce clause, and did not desire to extend those powers still further, as that its failure to confer the additional power must be attributed to a jealousy of the Federal Government which in turn requires the inference that it meant the commerce power to be a purely negative one.

The same ambiguity attaches to the history and fate of the proposal to confer on the Federal Government power "to legislate in all cases to which the separate States are incompetent or in which the harmony of the United States may be interrupted by the exercise of individual legislation." This proposal was actually adopted by the Conven-

tion by vote of 8 States to 2 (2 Farrand's Records, p. 21, South Carolina and Georgia alone voting in the negative), which argues anything but jealousy of Federal power. It was never "rejected", as petitioner states (Br., p. 158), but was dropped out by the Committee of Detail in drafting the text of the Constitution. In view of this history, it is quite as reasonable, indeed more reasonable, to suppose that the omission was due to the understanding by the Committee and the Convention that the granted powers were to be construed as extending to all matters wherein the States were incompetent, as to conclude, as petitioner does, that the disappearance of the resolution in committee must be construed as requiring those powers to be construed so as to narrow and limit their scope.

In final support of his contention that the framers of the Constitution intended by the commerce clause to confer on the Federal Government a purely negative, rather than an affirmative power, petitioner argues that the Convention imposed an important restraint upon the congressional power to regulate foreign commerce, viz, the prohibition against export taxes. He then proceeds to argue that congressional power to regulate foreign commerce is a broader and more extensive power than the power to regulate interstate commerce, and from these two propositions draws the conclusion that since the power to regulate foreign commerce was restricted by the express prohibition of the

export tax, the Convention must have intended to impose even greater restrictions, although unexpressed, on the power to regulate commerce among the States. No one disputes that the power to regulate foreign commerce is limited by the prohibition of an export tax; nor, for the purpose of the present argument, would it seem to make any difference whether or not the power to regulate foreign commerce is to be construed as broader than the power to regulate interstate commerce. What does seem pertinent, is that in one case the Convention saw fit to impose a restriction expressly and in the other did not. Surely it is a strange conclusion that because a restriction was expressly imposed on one power, it must be regarded as implying a will to impose some other unexpressed limitation on a power on which it was not imposed.

It must also be remembered that so far as relates to the power to regulate foreign commerce the express prohibition of the export tax proved to be not inconsistent with the subsequent laying of a total embargo. We are not here concerned with the power of Congress under the commerce clause to embargo commerce between the States. No embargo or prohibition is laid by the Act now before the Court. The question is simply as to the scope of the commerce power and even should it be conceded that the power to regulate commerce among the States may be in some respects or for certain purposes narrower than the power to regulate for-

eign commerce, this does not prove that the power to regulate interstate commerce is a purely negative power or tell us what its limits are. On these latter points the evidence adduced by petitioner is insufficient to support his contentions.

This inconclusiveness applies to the voluminous quotations by petitioner from speeches in the Federal Convention and letters of constitutional Fathers. It needs no proof that some members of the Convention wished the Federal Government to have comparatively broad, and others wished it to have comparatively narrow, powers. Some wished it to have broad powers with respect to certain subjects and narrow powers with respect to others. Certainly no general agreement can be shown that its powers with respect to commerce should be purely negative. On the contrary, some leaders of the time regarded the power of the Federal Government to regulate commerce in a different light. Monroe, writing to Jefferson before the Convention in support of a proposal to vest in Congress "the sole and exclusive power of regulating the trade of the states as well with foreign nations as with each other" stated it as his opinion that

> the effect of this would be to put the commercial economy of every state entirely under the hands of the union. (Writings of James Monroe, ed. Hamilton, Vol. I, p. 85).

Madison himself in the Convention said:

> The states are only great corporations having the power of making by-laws and these

> are effectual only if they are not contradictory to the general confederation. The states ought to be placed under the control of the general government. (I Farrand, Records, 471.)

A member of the Convention, writing after its conclusion in support of the adoption of the Constitution by the people stated, with reference to the scope of Federal power that

> the authority of the whole must be co-extensive with its interests . . . or else the whole would have interests without authority to manage them, a position which prejudice itself cannot digest. . . . As to the idea that the superintending sovereign must of consequence destroy the subordinate sovereignties of the several states, it is begging the question by inferring that a manifest and great usefulness must necessarily end in abuse. (John Dickinson, *Letters of Fabius,* First Series, in Political Writings, Volume II, p. 97.)

These quotations, while not conclusive upon the exact scope of the commerce clause, at least indicate that at the time of the adoption of the Constitution the Fathers were not so fearful of Federal power or so anxious to reduce it to a mere negation as they are sometimes represented today.

It is true that Madison in explaining and defending the Constitution referred to the need for restraining interferences by the States with interstate commerce (Madison in 3 Elliott's Debates,

259–260, referred to in petitioner's brief, pp. 179–180) but, as already indicated, such a statement of one of the purposes of the clause cannot serve as a limitation upon the express language of the grant. It is also true that Madison in his extreme old age, after nearly half a century of bitter political combat against the policies of Hamilton and his successors, expressed it as his opinion that the clause was "intended as a negative and preventive provision" (Letter to Cabell, February 13, 1829, 3 Farrand's Records, 478, quoted in petitioner's brief, p. 177), but such an expression made under such circumstances is not sufficient basis on any sound principles of construction to convert what is expressly an affirmative grant of power into a negative one.

To ask this Court, as the petitioner does, to hold at the present time that the power of Congress to regulate traffic among the several states is limited to a power to prevent interference with such traffic, is not merely not justified by historical considerations but flies in the face of the judicial construction of the clause which has prevailed for more than a hundred years—in order to convert what is expressed as an affirmative power to regulate into a negative power not to regulate, but merely to protect from regulation.

It is true that the exercise of any affirmative power by the Federal Government, whether it be the power of tax or the power to maintain armies and navies or the power to regulate commerce,

will to some extent, and perhaps vitally, affect the economic life of some or many of the States. There are States from which the removal of an army post would seriously dislocate the local economy. There are States which an alteration in the form of Federal taxation would relieve from heavy burdens, while it would increase the burdens upon others. The exercise of the commerce power in the form of the regulation of railroads operates very definitely to build up and maintain distributing centers and to dictate the location of manufacturing plants. Because these results follow, no one argues that the existence of Federal power should be denied or that the Constitution would not have been adopted if the men of 1789 could have known that they would follow. The men of 1789 were impressed above all things with the importance of a Federal Government strong enough to give effective aid in the solution of the economic difficulties of the time. They expressly granted certain powers to the Federal Government and it is to be presumed that they intended those powers to be exercised whatever consequences might follow for the States. Under the Constitution, the powers of the States are reserved powers, residuary powers. It is not understood among lawyers that the residuary clause in a will operates to cut down the specific legacies. What is true of the construction of a private instrument is *a fortiori* true of the construction of a

constitution. The question presented on many fronts today is whether we shall stand upon the Constitution or by construction reduce it to what the anti-Federalists of 1789 would have liked to see it.

III. The Unfair Trade Practice Provisions

THE PROVISIONS OF THE ACT AND CODE PROHIBITING SPECIFIC UNFAIR COMPETITIVE PRACTICES ARE CONSTITUTIONAL

There can no longer be any question that Congress may regulate competition in interstate commerce by prohibiting unfair practices. The jurisdiction and authority of the Federal Trade Commission rests upon this power. Subsection (i) of Part II of Section 4 of the Act lists a number of specific practices which are prohibited as unfair. Petitioner concedes that some, at least, of these practices may be constitutionally prohibited by Congress under the commerce power (Pet. Br. p. 223). Yet, the basis for such an exercise of the commerce power is precisely the same as the basis for the regulation of prices in sales in or directly affecting interstate commerce, *viz.* competition in the sale of coal across state lines. We do not perceive why the commerce power should extend to one aspect of competition and not to another.

Petitioner apparently conceives of the prohibition of these practices as being limited in purpose to the maintenance of price fixing (Pet. Br., p. 19).

It is enough to note that two of the practices prohibited—consignment of unordered coal and intentional misrepresentation of sizes—were referred to by this Court in *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344, 362–363, as having aggravated the unfavorable condition of the industry. The prohibition of these and others of the practices mentioned in the Act (e. g. commercial bribery, unauthorized use of trade names, etc.) cannot be considered as merely in aid of price regulation; the practices constitute economic evils in and of themselves.

IV. The Labor Provisions

THE LABOR PROVISIONS OF THE ACT ARE CONSTITUTIONAL

INTRODUCTION

Petitioner makes a general attack upon the labor provisions of the statute on the ground that they are a "regulation of production" (Br., p. 116, 219), and this general objection requires some answer before the specific provisions are taken up for consideration. While it is true that in one aspect labor relations in the coal industry are related to and concerned with the productive stage of the industry, it does not follow that regulation of them is beyond the power of Congress simply because Congress has no power to regulate production. The record makes it plain that labor relations in the coal industry are also intimately connected with the sale of coal, with distribution and competition,

and that their relationship to this aspect of the industry is much more important and significant than their connection with production in the sense of the removal of the coal from the ground.

The fact that a federal regulation may affect a productive activity does not invalidate it if the activity is directly connected with interstate commerce and if the regulation is concerned with its relationship to commerce. Thus, although Congress could not regulate a combination of manufacturers as such (*United States* v. *E. C. Knight Co.,* 156 U. S. 1), it could prohibit such a combination when proved to have the effect of monopolizing interstate commerce (*Standard Oil Co.* v. *United States,* 221 U. S. 1). See also *Standard Oil Co.* v. *United States,* 283 U. S. 163, *infra,* pp. 229–230. It is clear from these decisions that if a transaction may be subsumed under two categories, the test of whether it may be regulated by Congress is not whether it can be subsumed under a category which the federal government cannot regulate, but whether it *can* be subsumed under one within the federal powers. Although Congress may not regulate production or manufacture as such, if a subject of regulation is related to a granted power, such as the maintenance of the Army, it is immaterial that it may also be regarded as an aspect of production. See *Hamilton* v. *Kentucky Distilleries,* 251 U. S. 146, in which federal regulation of the local sale of intoxicating liquor was sustained under the war power.

Such cases as *Kidd* v. *Pearson,* 128 U. S. 1, *Heisler* v. *Thomas Colliery Company,* 260 U. S. 245, and *Oliver Iron Mining Company* v. *Lord,* 262 U. S. 172, relied upon by petitioner, which hold that manufacture and production may be subject to state regulation or taxation, do not mean that certain aspects of production may not be regulated by Congress when they directly affect interstate commerce. It is well established that the powers of state and nation may overlap to some extent. "The rule which marks the point at which state taxation or regulation becomes permissible" does not necessarily prevent "interference by Congress in cases where such interference is deemed necessary for the protection of commerce among the states." *Swift & Co.* v. *United States,* 196 U. S. 375, 400; *Stafford* v. *Wallace,* 258 U. S. 495, 525. See also *Minnesota* v. *Blasius,* 290 U. S. 1; *Dickson* v. *Uhlmann Grain Company,* 288 U. S. 188. The dicta in *Kidd* v. *Pearson* and the other cases cited to the effect that Congress may not regulate production as such is well-established law and not challenged by the Government here.

The Bituminous Coal Conservation Act regulates labor regulations only because and in so far as they constitute an integral and essential element in the competitive process. Producers deny to their employees the right of collective bargaining and cut wage rates not because of anything having to do with the *mining* of coal, in the sense of the

physical removal of the coal from the ground, but in order to gain an advantage over others in the *sale* of coal in commerce. The Act regulates such conduct by producers in order to prevent them from gaining such an advantage *in selling coal.*

It is therefore not sufficient for petitioner to say that the regulation of labor relations is a "regulation of production". For a regulation of certain aspects of productive activity may be at the same time a regulation of interstate commerce through regulation of competition in such commerce, and the absence of power over production cannot limit the commerce power when commerce and production thus overlap.

A. THE PROVISIONS OF THE ACT WITH RESPECT TO MINIMUM WAGES AND MAXIMUM HOURS OF WORK, AND ITS PROVISIONS PROTECTING THE RIGHT OF EMPLOYEES TO ORGANIZE AND BARGAIN COLLECTIVELY, ARE A VALID EXERCISE OF THE COMMERCE POWER OF CONGRESS

1. The extent to which, in the bituminous coal industry, the labor practices regulated by the Act directly affect interstate commerce

The Act requires that the code shall provide that hours of labor agreed upon in collective bargaining between producers representing more than two-thirds of the national tonnage and representatives of a majority of the mine workers shall be accepted by all code members, and that wages agreed upon by the same proportions of producers and of mine workers in any district or group of districts shall be

accepted by the code members operating in such districts or group of districts. (Sec. 4, Part III (g).) The code must also provide that employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from interference, restraint or coercion of employers in such matters, and that no employee shall be required as a condition of employment to join any company union. (Sec. 4, Part III (a).)

The validity *under the commerce power* [1] of these provisions depends upon whether they are reasonably adapted to removing or mitigating practices which directly affect interstate commerce. Since the precise line between intrastate conduct directly affecting interstate commerce, subject to federal control, and that affecting such commerce only indirectly and therefore lying beyond federal power "can be drawn only as individual cases arise" (*Schechter Poultry Corp.* v. *United States,* 295 U. S. 495, 546, *supra*), it is necessary to explore fully the conditions existing in the industry in so far as they relate to the effect of the labor provisions of the Act upon interstate commerce.

(i) *Conditions peculiar to the industry with reference to the effect of wages and hours upon interstate commerce*

The statement of facts at the beginning of this brief disclosed that there is unremitting pressure

[1] Their validity under the due process clause and in respect of delegation of power are considered later, *infra,* pp. 253–275.

on operators to maintain production even when output can be marketed only by selling at or below cost, that the wage scale is both the primary determinant of cost and the only substantial cost item at all subject to the producer's control, that labor costs are a much higher percentage of total cost of production than in any other industry except anthracite coal, that wage cutting is, in the bituminous coal industry, practically indispensable to price cutting, and that wage cutting has for many years constituted the outstanding competitive device in the industry. (*Supra,* pp. 37–41, 47–54, 60–64.) Since small variations in the mine price as between mines in different areas and states may cause large variations in interstate shipments of coals (Fg. 176, R. 209), variations in the wages paid those engaged in production affect immediately the course and movement of interstate commerce to an extent probably not paralleled in any other industry. The trial court found (Fg. 182, R. 211):

> In the bituminous coal industry cutting of wage rates is the predominant and most effective method of gaining competitive advantages and under the conditions which have existed in the industry has proven to be a destructive method of competition and has tended to create a great disparity in wage rates between producers operating in different states and producers operating in the same states. Such disparities in wage rates have permitted disparities in price which

> have in turn directly shifted, diverted and dislocated the normal flow of bituminous coal in interstate commerce * * *.

The trial court also found (Fg. 183, R. 211):

> The wages of persons engaged in the production of bituminous coal have a very substantial effect upon interstate commerce in the coal so produced.

(*ii*) *Conditions peculiar to the industry with reference to the effect of freedom of collective bargaining upon interstate commerce*

Before dealing with the question of wages and hours as such, the Government wishes to call attention to conditions existing in this industry which make the issue whether or not employees shall be guaranteed by law the freedom to bargain collectively of paramount importance to the normal and uninterrupted flow of interstate commerce. Because of the advantage in interstate commerce which, apart from such a guaranty, results to operators who deny to their employees freedom in collective bargaining, as against operators who accord such freedom, collective bargaining has always been organized on an interstate scale, with direct reference to competition in interstate commerce. Since the refusal to recognize collective bargaining in certain areas is a continuous threat to its continuance in other areas, this leads to conflicts and strikes for the direct purpose of preventing the sale in interstate commerce of low-priced coal origi-

nating in areas where collective bargaining is not permitted. It also leads, in areas where collective bargaining prevails, to difficulties in reaching new collective agreements upon expiration of old ones, since the employers who have been parties to such agreements must meet the competition of producers in areas where collective bargaining does not prevail, and as a result are reluctant to agree to terms which they know will be undercut by the producers in these latter areas. (*Infra*, pp. 209–212.) Accordingly, the renewal of a collective agreement in this industry has always proved to be a painful process, attended not infrequently by suspensions of operations until the terms could be worked out in the teeth of the difficulty of meeting competition from the areas where no such bargaining prevailed.

The strength of the collective bargaining movement on the part of workers in this industry, which dates back many years, grows out of certain conditions of their employment. The workers usually live in isolated communities where the mine offers the only means of livelihood. (R. 432, 481.) They are tied to the mine not only by their isolation but by their lack of training for any other occupation, and the expression "once a miner, always a miner" is more than an empty phrase.[1] Fur-

[1] Morris, *The Plight of the Bituminous Coal Miner* (Univ. of Pa. Press, 1934) p. 68:

"The relation of the miner to his job is not so much that 'mining gets into his blood' as that nothing else gets there. It is a blind-alley occupation which does not lead to other industrial contacts. The miner not only works in an isolated

thermore, operators have deliberately adopted employment policies designed to prevent self-organization and to increase the employee's dependence upon his employer. (R. 431, 496–497, 499.) The exaction of contracts not to join a union while continuing in employment, the so-called "yellow dog" contract, has enabled employers to prevent self-organization, since third persons could be enjoined from inducing breach of these contracts.[1] (Fg. 107, R. 167; R. 431; *Hitchman Coal & Coke Co.* v. *United States,* 245 U. S. 229.) Employees have also been required as a condition of employment to live in company houses under leases permitting immediate eviction upon violation of the stipulations of the "yellow dog" contract. (R. 445, 457–458; Pl. Ex. 64, R. 927.) The complicated system of piece rates by which most of the workers are paid leads

room, but the whole camp in which he lives is isolated from the industrial world. The miner is in an occupational rut from which he can extricate himself, even in normal times, only with the greatest difficulty. His mining experience is no asset to him as an industrial worker. In fact, his work habits in the mine tend to be a definite handicap. He does not fit easily into this rigorous, lockstep, boss-controlled factory organization. The expression, 'Once a miner, always a miner', does not signify so much the passionate devotion a miner feels towards his job, as it expresses the limited occupational opportunities open to a man once he has become a miner."

[1] Section 3 of the Act of March 23, 1932, c. 90, 47 Stat. 70 (U. S. C., Title 29, Sec. 103), declares such contracts to be "contrary to the public policy of the United States" and provides that they shall not be enforceable in, or "afford any basis for the granting of any legal or equitable relief by", any court of the United States.

to misunderstanding and abuse, especially when the miners are not permitted to have their own checkweighman to guard against shortweighting by their employers. (Fg. 143, R. 194; R. 444, 481, 498.) In practically no non-union mines in the east did the miners have checkweighmen in 1933 prior to the N. R. A. code. (R. 444.)

While these and other conditions furnished a powerful stimulus to self-organization,[1] at the same time other circumstances dictated organization on an interstate and practically a national basis. By reason of the effect of varying wages on interstate competition, no organization could survive on any other basis.[2] (R. 429.) When wage rates in a given area, State or group of States, are fixed by collective bargaining, producers in unorganized areas and States are given the opportunity to cut their wages and their prices just sufficiently to take business from mines maintaining the scale of pay and hours as a result of such bargaining. (R. 411.) The collective bargaining agreements act as a kind of umbrella—for those who are not parties to them. The absence of collective bargaining agreements gives the operator a direct advantage in interstate commerce and, to the same degree, imposes upon

[1] The miners were among the first workers to organize unions in this country. Suffern, *The Coal Miners' Struggle for Industrial Status* (Institute of Economics, 1926), p. 19.

[2] Tryon, *The Effect of Competitive Conditions on Labor Relations in Coal Mining*, Annals American Academy of Political and Social Science (Vol. CXI, Jan. 1934), p. 94.

operators bound by such agreement a serious handicap in competing in such commerce.[1]

Merely reducing the wage does not end the unequal competition between the man with the fixed cost and the man with the flexible cost.[2] (R. 411.) The operator not bound by the collective agreement is still free again to cut the rate. (*Ib.*) Experience demonstrates that this is precisely what happens.[3] (Compare the average daily wage in Illinois and in West Virginia in 1922, 1924 and 1929, Fg. 113, R. 174.)

(iii) *Illustrations drawn from the history of the industry showing how directly the wage rate and denial of freedom to bargain collectively have affected interstate commerce*

Collective bargaining in this industry has always been conducted on an interstate basis and with direct reference to the effect of the wage rate upon interstate commerce. During the entire period from 1898 to the war, representatives of the producers and of the United Mine Workers negotiated

[1] Suffern, *The Coal Miners' Struggle for Industrial Status* (Institute of Economics, 1926), pp. 433–434.

[2] Suffern, *ib.* at p. 431: "The maintenance of individual bargaining enables the non-union operators to under-cut the wage scale fixed by the union fields no matter what the scale is."

[3] It was the view of Secretary of Commerce Hoover, testifying before the House Committee on Interstate and Foreign Commerce in 1926, that the non-union mines would have cut under any scale agreed upon by the union mines at Jacksonville in 1924. (Hearings on Coal Legislation, 69th Cong., 1st Sess., p. 529.)

collective agreements covering the central competitive field—Illinois, Indiana, Ohio and western Pennsylvania. (Fg. 128, R. 186.) These agreements were predicated upon the understanding that the wages and hours agreed upon for the central competitive field would be applied to all other unionized districts, through the medium of collective bargaining agreements covering these other districts "coordinated to the basic agreement arrived at in the central competitive field." (R. 429; 340.) The procedure adopted gave practical recognition to the fact that the "effect of a variation in wage standards * * * creates chaos in marketing." (R. 429.) The problem dealt with was similar to that which arises when the fixing of minimum prices is undertaken, namely, coordination of the practice controlled—in the one case wages and hours and in the other minimum prices—in relation to the effect of the practice upon interstate competition.[1]

The controlling effect in this industry of labor costs upon price and of price upon interstate competition and interstate commerce (Fg. 182, R. 211) was the reason for the development of this system of collective interstate agreements correlating wages on an interstate basis with reference to

[1] The Bituminous Coal Conservation Act provides that minimum prices f. o. b. the mines shall be established and that these prices shall then be coordinated in common consuming markets upon a fair competitive basis. (*Supra*, pp. 167–169.)

interstate competition. It is significant that, with few and unimportant exceptions, similar collective interstate agreements are not found in other manufacturing or productive industries in this country.

In the pre-war period, although about 60% of the output of the country was from districts where collective bargaining prevailed (R. 340), the competition of non-union districts made it difficult, when the various agreements expired, to negotiate new ones. (Fgs. 80, 132, R. 149, 189; R. 296.) On such occasions there was commonly a suspension of work until new terms could be agreed upon. (R. 297.) The two largest, those occurring in 1906 and 1910, each involved approximately 211,000 men in ten States. (Fg. 80, R. 149.)

The serious adverse effects upon interstate competition of varying wage rates led the operators in the organized fields to urge upon the union the necessity of organizing competitive fields in the south. In *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344, 403–404, where the question at issue was union responsibility under the Sherman Act for damages caused by a strike occurring in 1914, the Court said, with reference to the annual conferences between operators in the central competitive field and the union miners:

> In these conferences the operators frequently complained that the competition of many non-union mines in Western Pennsylvania and the whole of West Virginia was ruinous to their business because of the

> low cost of production of coal in such mines due to the lower wages and less expensive conditions of working than in union mines, and urged that something must be done to stop this, or that the union scale of wages be reduced. * * *
>
> From this time on [1898] in every annual conference until after the controversy in the case before us in 1914, the subject recurred.

Strikes in the pre-war period in attempts to gain recognition of the union and to secure collective bargaining agreements in non-union fields occurred in West Virginia in 1902, 1912, and 1913; in Alabama in 1902, 1903 and 1904; and in Colorado in 1903, 1904, 1913 and 1914. (Fg. 81, R. 150.) The 1913–1914 strike in Colorado resulted in calling out the militia, the so-called Ludlow massacre, intervention of federal troops and a congressional investigation. (Fg. 82, R. 150–151.) The 1912–1913 strike in the Paint Creek and Cabin Creek Districts of West Virginia was accompanied by bloodshed, declaration of martial law and led to an investigation by the Senate. (*Ib.*) See S. Rep. No. 321, 63rd Cong. 2nd Sess.

The facts concerning the industry previously outlined (*supra,* pp. 47–64) have shown the intimate relation of wages to prices and hence to interstate competition in the years following 1920. It is clear from the record that the competitive struggle which, even during years of great general prosperity, brought the bituminous coal industry to its low estate was essentially a struggle between wage-

cutting producers and producers seeking to maintain wage rates established by collective bargaining. It was a struggle between areas where collective bargaining prevailed and areas where it did not prevail. This was apparent to the operators and the miners alike. When negotiations were begun in the central competitive field for a new agreement to replace the one expiring on March 31, 1922, the operators demanded that it "provide for a continuous competitive wage scale with states south of the Ohio River" (R. 434),—i. e., the states not practicing collective bargaining. Similarly, when the operators and the men met early in 1927 for the purpose of negotiating a new agreement to replace the one expiring in that year, the operators again advanced the proposal that "the wage scale for the Central Competitive Field commencing April 1, 1927, must be continuing and at all times a competitive scale with the wages and conditions prevailing in West Virginia and Kentucky." (Pl. Ex. 62, R. 924).

It is significant that the operators did not demand a wage reduction as such. Their proposals contemplated subsequent upward as well as downward revisions of the wage scale. What they asked was that recognition be given to the fact that the wages paid in areas without collective bargaining directly affected their own ability to compete and the flow and movement of coal from their own mines in interstate and intrastate commerce.

The operators' proposals to which we have referred, made in 1922 and again in 1927, were rejected by the miners upon the ground that, if they had been accepted, operators in areas where there was no collective bargaining would, in effect, have been given the power to dictate the rate of pay in areas where there was collective bargaining. (R. 437.) But the real source of difficulty in reaching new agreements, the disparate scales of pay in different areas, was not easily bridged over, and, because of this difficulty, there was on each occasion a prolonged strike disrupting and disturbing interstate commerce. The resulting strike in 1922 involved 460,000 men and at one time 73% of total productive capacity and produced a coal shortage. (Fg. 85, R. 154.) The strike in 1927 closed down mines in a number of States from five to seven months, caused production in Illinois to drop from 10,000,000 tons a month to practically nothing, diverted about 15,000,000 tons of business from northern to southern states, and caused the trade to accumulate, in anticipation of a strike, large excess stocks of coal, at an additional cost of about $20,000,000. (Fgs. 108, 110, 111, R. 169–171.)

The course of events during the period of the Jacksonville agreement running for three years from April 1, 1924, illustrates the manner in which the pressure of wage and price competition, which go hand in hand, exert a widening and cumulative effect. Up to the time of the agreement the producers in the Kanawha Valley of southern West

Virginia had signed collective bargaining agreements but, being nearest to areas where such agreements did not prevail, they were most exposed to competition in interstate markets of the low-priced coal of unorganized areas. (Fg. 108, R. 168.) Finding themselves unable to meet this competition, they refused to renew or enter into any wage agreement. (*Ib.*) The movement to abrogate wage contracts spread from the Kanawha Valley northward and westward and continued throughout the period of the Jacksonville agreement, to the accompaniment of strikes, many of them prolonged, which closed down mines in northern West Virginia, Ohio and Pennsylvania and substantially affected interstate commerce in coal. (*Ib.*)

During the life of the Jacksonville agreement there was an abnormal and decided shift in commerce in coal from northern to southern states. Comparing 1923, the year preceding the agreement, with 1926,[1] the last full year of the agreement, there was a decline in shipments from northern states of about 34,000,000 tons and an expansion in shipments from the three leading southern states of about 58,000,000 tons. (Def. Ex. 28a, R. 1070.) That this change was primarily due to the wage factor is indicated by the fact that there was very little change in the relative production of the two

[1] If 1923 were compared with 1927 a still larger shift in business would be shown but the protracted strikes curtailing production in northern states in 1927 made this basis of comparison misleading.

regions after 1928 when, following the 1927 strike, most of the operators in important areas in the north discontinued collective bargaining and the southern wage differential contracted. (Fgs. 109, 119, 124, R. 170, 180, 183.)

After 1927, as the area within which collective agreements were maintained narrowed, the price cutting associated with wage cutting did not disappear, but the price cutting was that of individual operator against individual operator, both within and without the same area. The measure of stabilization achieved by collective bargaining, which had always been only partial, did disappear and the result, as one experienced operator described it, was "confusion and chaos". (R. 347.)

Up to this point we have dealt with the effect upon interstate commerce of differing wage scales and of denial of collective bargaining chiefly from the standpoint of the operator. These practices were naturally of just as great concern to the miners and frequently provoked action on their part directly affecting interstate commerce. In a number of instances the strikes which resulted were of the precise character held in *Coronado Coal Co.* v. *United Mine Workers,* 268 U. S. 295, 310, to be within the scope of the Sherman Act, and consequently within the federal commerce power, because of an intent to "control the supply entering and moving in interstate commerce, or the price of it in interstate markets."

Hitchman Coal & Coke Co. v. *Mitchell*, 245 U. S. 229, 243, refers to the policy adopted by the miners in the middle 1900's "to relieve the union miners of Ohio, Indiana, and Illinois from the competition of the cheaper product of the non-union mines of West Virginia," which policy was to be carried out by strikes local to West Virginia. *International Organization* v. *Red Jacket C. C. & C. Co.*, 18 F. (2d) 839, certiorari denied, 275 U. S. 536, grew out of strikes in West Virginia in 1920 and 1922 for a similar purpose. The court (p. 844) said that "*the effect of the standard of wages on competition between employers applies in the coal industry, not to a restricted neighborhood, but to the industry as a whole*; for in that industry the rate of wages is one of the largest factors in the cost of production, and affects not only competition in the immediate neighborhood but that with producers throughout the same trade territory." Upon the question whether defendants' combination restrained interstate commerce within the meaning of the second *Coronado* case, *supra*, the Court said (p. 845):

> Moreover, it is perfectly clear that the purpose of defendants in interfering with production was to stop the shipments in interstate commerce. *It was only as the coal entered into interstate commerce that it became a factor in the price and affected defendants in their wage negotiations with the union operators.*

The oppressive tactics and practices to which operators have resorted in order to prevent collective bargaining have likewise been the cause of many disorders seriously disrupting interstate commerce. When such tactics are employed, force is met with force and conflicts of extraordinary bitterness result. Miss Roche, formerly president of the second largest coal company in Colorado, testified that in the fall of 1927 practically 80% of the mine workers of the state, entirely unorganized, went out on a spontaneous strike which lasted until early in 1928. (R. 499.) It was a revolt against intolerable working conditions. The workers were required to live in company houses and to trade at company stores; they were shortweighted, and checkweighmen were denied them; the operators used industrial spies. (R. 498.) The same witness testified that during the 1913–1914 strike in Colorado the records of her company showed that it had paid nearly $500,000 into a joint fund for importing detectives, strike breakers and gunmen, and for arming guards, electrifying barbed wire, building an armored car, etc. (R. 497–498.)

A condition of guerrilla warfare likewise prevailed in parts of Pennsylvania during the time when various operators were abrogating the Jacksonville agreement (R. 435–436.) Coal companies in the state employed during this period 5,200 private policemen. (R. 435.) In the course of the strikes referred to in the *Red Jacket* case, *supra,* sniping between Baldwin-Felts guards and mine

workers continued over a three-months period and, after the guards had killed two men, serious loss of life was probably only averted by the despatch of 5,000 federal troops to the zone of conflict. (R. 447–448.)

The United States Coal Commission reported in 1923 (Vol. III, p. 1331):

> In their endeavor to keep the union out, non-union operators have used widely differing methods. A few of them have attempted to compete with the union for the loyalty of their employees, but most of them have resorted to methods of force.

The Investigation Commission appointed by the Governor of Kentucky in 1935 stated in its report [1] upon Harlan County (one of the few important areas in which, since 1933, the operators have refused to enter into collective wage and hour agreements):

> Free speech and the right to peaceable assemblage is scarcely tolerated. Those who attend meetings or voice any sentiment favorable to organized labor are promptly discharged and evicted from their homes. Many are beaten and mistreated in most injurious and un-American methods by some operators using certain so-called "peace officers" to carry out their desires.

[1] The report was made a part of the record in the hearings which led to the enactment of the Bituminous Coal Conservation Act. (Hearings before House Ways and Means Committee on H. R. 8479, 74th Cong., 1st Sess., pp. 636, 637.)

Such conditions of intimidation and violence have been found to exist in different areas and at different times when the right to collective bargaining has been denied. The Congressional investigation of 1921[1] brought to light conditions of violence and oppression by operators in the West Virginia fields. The former Attorney General of West Virginia testified that the mine guard system maintained by the operators to prevent organization of the men was one of the greatest sources of trouble.[2] When during the period of the Jacksonville agreement pressure from the southern fields caused operators in Pennsylvania, Ohio and Northern West Virginia to abrogate their collective bargaining agreements, like conditions prevailed. The Congressional investigation of 1928[3] disclosed that many of the coal fields were camps, armed with machine guns, rifles, tear bombs and pistols, with the mines barricaded and the evicted families of former employees living in tents or crowded wooden barracks. There were said to be in the Pennsylvania coal fields at that time not less than 4,000 so-called coal-and-iron police, commissioned as state officers but privately paid by the

[1] Hearings pursuant to S. Res. 80, 67th Cong., 1st Sess., on Conditions in West Virginia Coal Fields before Senate Committee on Education and Labor.

[2] *Ib.*, p. 720.

[3] Hearings pursuant to S. Res. 105, 30th Cong., 1st Sess., on Conditions in the Coal Fields of Pennsylvania, West Virginia, and Ohio before the Senate Committee on Interstate Commerce.

operators. The hearings are replete with accounts of clashes, assaults, armed violence and blanket injunctions.

(iv) Conclusion

We have set forth the interstate character of collective bargaining in this industry and its relation to interstate competition; the shifting movements of interstate commerce caused by disparate wage scales in different areas, accentuated by collective bargaining in certain areas and not in others; the difficulties in arriving at collective agreements when the commerce of operators parties to such agreements were threatened by the wage-cutting and price-cutting of competitors who refused to bargain collectively; and the bitterness with which the issue of collective bargaining was often fought out, engendering labor disturbances which seriously obstructed interstate commerce and which in many instances had this very objective.

The Government does not contend or suggest that these and other difficulties of the industry, however great or however insoluble except through federal regulation, justify extending the commerce power beyond its proper limits. Our sole purpose has been to show the *directness,* in this industry, of the impact of the wage scale and of the prevalence or absence of collective bargaining, upon interstate commerce. It is believed that this is a matter of general common knowledge. As our review of the facts discloses, those in the industry, both

operators and employees, have shown by their actions that they have at all times recognized, and have repeatedly bowed to, its force. It therefore seems proper to conclude that in this industry the scale of pay and the hours of work, and refusal to recognize the right of collective bargaining, have a direct, immediate and substantial effect upon interstate commerce to a degree not found in industry generally, or perhaps in any other industry.

2. Under applicable legal principles and decisions, the provisions of the Act regulating wages and hours of work are within the commerce power of Congress

Subsection (g) of Part III of Section 4 of the Act provides that when producers of more than two-thirds of the national tonnage and a majority of the workers have entered into a collective bargaining agreement respecting maximum hours of labor, all code members shall observe such maximum hours. The subsection further provides that when a wage agreement has been made by like proportions of the producers and employees within a district or group of districts, the minimum wages so agreed upon shall be accepted by other producers in the same districts.

Before discussing any question of delegation of legislative power which the form of this regulation may raise, a matter which is dealt with later (*infra*, pp. 263–275), it is first necessary to consider the

constitutional basis of the power of Congress to act in the matter of wage and hour regulation in this industry at all.

It has been conclusively demonstrated, and the trial court found, that in the bituminous coal industry the wage scale substantially affects the price of coal sold in interstate commerce and the course and movement of coal in such commerce. (Fg. 183, R. 211.) But petitioner contends and the trial court held that, however direct, as well as substantial, this effect might seem to be upon the basis of the facts disclosed as to this industry, nevertheless *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495, requires a contrary conclusion. (R. 1180–1181.) The contention is that the *Schechter* case holds that wages and hours of employees engaged in production are, as a matter of law, always indirect in their effect upon interstate commerce.

It is submitted that neither the decision in the *Schechter* case in the light of the issues there presented, nor the language and reasoning of the opinion read in the light of those issues, establishes a rule of constitutional law that the terms of the labor contract are always and necessarily indirect in their effect upon interstate commerce. The Government submits that, on the contrary, upon reason and authority, and with full recognition of the principles governing constitutional interpretation where the borderline between federal and state power is in issue, the question of what acts have

and what have not a direct effect on interstate commerce is always a question of fact, and, that on the basis of the facts of the bituminous coal industry as presented by this record, the wages and hours of employees in that industry *directly* affect interstate commerce and are, therefore, subject to federal control.

The *Schechter* case, so far from laying down any general rule that wages and hours as a matter of law always affect interstate commerce indirectly, on the contrary, expressly states that while the distinction between that which directly affects interstate commerce and that which indirectly affects it is clear in principle, application of the principle to particular situations can be determined only as those situations arise. The Court said (p. 546):

> In determining how far the federal government may go in controlling intrastate transactions upon the ground that they "affect" interstate commerce, there is a necessary and well-established distinction between direct and indirect effects. The precise line can be drawn only as individual cases arise, * * *.

This language seems to preclude the view that a general rule was meant to be laid down to the effect that wages and hours in all cases affect commerce indirectly as a matter of law.

The opinion in the *Schechter* case was at pains to point out the specific nature of the employment in which the workers in that case were engaged,

under conditions such that it was held that their wages and hours did not directly affect interstate commerce. The Court stated (p. 548), for example, that the issue related to employees in an essentially local business. Details as to this business are set forth in the opinion and attention is called to the fact that the employment was in a slaughterhouse where the poultry was held for local sale to retail dealers after interstate commerce had come to an end. (See pp. 520–521, 543.) It is interesting to note that when the Court, after having described the local nature of the business, discusses the question of whether or not interstate commerce was directly affected by the wage and hour regulation involved in that case, it does not undertake to discuss the effect on interstate commerce of wages and hours in general, but the effect of the wages and hours of defendants' employees. The Court said (p. 548):

> The question of chief importance relates to the provisions of the Code as to the *hours and wages of those employed in defendants' slaughterhouse markets.* It is plain that these requirements are imposed in order to govern the details of defendants' management of their *local* business. The persons employed in slaughtering and selling in *local* trade are not employed in interstate commerce. *Their* hours and wages have no direct relation to interstate commerce. The question of how many hours *these employees* should work and what *they* should be paid

> differs in no respect from similar questions *in other local businesses which handle commodities brought into a State and there dealt in as a part of its internal commerce.*

Words could not have been more fitly chosen to indicate that what the Court was passing upon was the situation of the employees in a business of the type involved in the *Schechter* case, and not upon the general question of whether wages and hours can never directly affect interstate commerce. The essential difference between the effect upon interstate commerce of the employment involved in the *Schechter* case and that involved in the case at bar is clearly brought out by the nature of the argument which the Government made, and was required to make, in that case in order to support the contention that interstate commerce was there affected.

In the *Schechter* case, the slaughterhouse operators sold slaughtered poultry only in intrastate commerce to the local trade. However, the live poultry which they bought moved to New York City in interstate commerce. When a slaughterhouse operator reduced the wages of his employees who slaughtered the poultry which he then sold in intrastate commerce, he took advantage of this saving in his labor cost to reduce the price of his poultry in such sales. The Government contended that in order to meet such price reductions in local sales, other competing slaughterhouse operators

sought to pay lower prices for the live poultry which they purchased and which was shipped to New York in interstate commerce, and that the result was to create a weakness in the price of poultry moving to New York in interstate commerce. The Government also contended that the lower prices at which a wage-cutting slaughterhouse operator sold in the local intrastate trade led competitors in this trade to demand cheap grades of poultry which would reduce their costs, and that these conditions stimulated the flow of low-grade poultry in interstate commerce.

The speculative and tenuous character of the connection thus sought to be established between wage cutting in the local slaughterhouse trade on the one hand and interstate commerce on the other is obvious. It is not at all certain that the necessity of meeting the low local prices of a wage-cutting slaughterhouse operator would cause competing operators to pay a lower price for poultry shipped in interstate commerce than they would otherwise pay. Presumably wholly apart from any such inducement, each operator would seek to pay as low a price for his live poultry supply as possible. That he would be able to secure live poultry shipped from other States at a lower price than otherwise because some of his competitors were price cutting in Brooklyn and he had to meet their prices, seems by no means certain. There is thus no clear causal relationship between the effect of

the local wages and resulting local prices on the one hand and either the price in interstate commerce or the movement in interstate commerce on the other hand. The effect is hypothetical. This is also true of the argument that a desire to meet the low prices of competitors in local commerce would result in the movement of low-grade as distinguished from high-grade poultry in interstate commerce, even if that were significant.

In the bituminous coal industry, on the other hand, when a producer who sells his goods in interstate commerce reduces his labor costs, and in consequence reduces the prices at which he can offer his goods in interstate commerce, he immediately and as a matter of statistical demonstration takes business away from producers selling at higher prices, and his lower prices in these interstate commerce transactions compel such competitors either to meet these prices in other interstate commerce transactions or to lose orders in interstate commerce. The wage cutting operates in a demonstrably direct and unbroken straight-line sequence on the interstate transactions in, and the interstate movement of, coal. In the situation involved in the *Schechter* case, the wage cutting, if it operated on interstate commerce at all, operated first on the intrastate price and thereafter the connection had to be traced backward through the uncertain and speculative effect of an intrastate price on the interstate prices in transactions lying farther back

along the line toward the ultimate producer. In the bituminous coal industry, wage cutting operates immediately on a directly subsequent sale in interstate commerce.

Although, therefore, neither the decision nor anything in the opinion in the *Schechter* case appears to be in any way controlling as to the validity of the wage and hour regulation in the Bituminous Coal Conservation Act, there remains the question of the validity of that regulation upon reason and authority, giving due consideration to the appropriate spheres of authority of the federal government, on the one hand, and the states, on the other, under our constitutional system. When Congress undertakes to regulate intrastate conduct because of its effect upon interstate commerce, the courts are presented with the difficult and delicate problem of holding the scales even between the power over commerce among the States conferred upon Congress, supplemented by the power to use all means necessary and proper to make such regulation effective, and the preservation of the constitutional freedom of the States.

While the Government is confident that this Court in the *Schechter* case did not intend to announce any sweeping general rule that *no* practice or conduct related to production can directly affect interstate commerce, it equally disavows any contention or suggestion that *all* practices materially entering into the cost of production of those selling in interstate com-

merce directly affect such commerce. No merely mechanical rule of causation for the determination of what is a direct and what is an indirect effect seems satisfactory. The test, as in so many branches of the law, would seem to be one of degree. "The law is not indifferent to considerations of degree." *Schechter Poultry Corp.* v. *United States, supra,* p. 554.

The Government submits that it would be erroneous to assume that all intrastate conduct of a certain kind would have the same effect, either direct or indirect, upon interstate commerce, regardless of the circumstances which condition its operation. The fact that wages and hours are an incident to all production is delusive; the universality of these practices does not justify applying an equally universal rule—that wages and hours in productive enterprise are either always direct or always indirect in their effect on interstate commerce. Obviously any such conclusion would not accord with reality.[1] Adoption of such a general rule could be supported, if at all, only upon the ground of convenience, that it would avoid the problem of determining, as individual cases may arise involving regulation of wages and hours in different trades or industries, whether under the facts as to the particular trade or industry, the effect of these practices on interstate commerce

[1] In *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, 360, this Court said, with reference to determining the reasonableness or unreasonableness of agreements partially restraining trade, "Realities must dominate the judgment".

is direct or indirect. The *Schechter* case indicated (p. 546) that there is no short-cut solution to the problem, that the "precise line" between intrastate transactions affecting interstate commerce directly and those affecting it indirectly "can be drawn only as individual cases arise."

This Court has said that a combination which brings under control "a decisive factor in the cost of production" so that such control is "tantamount to the power to fix prices" may be within the Sherman Act. *Standard Oil Co.* v. *United States,* 283 U. S. 163, 174. These views were expressed with reference to a combination to interchange patent licenses for the production of gasoline by a certain process. If, therefore, the Constitution gives Congress the power to regulate intrastate conduct respecting a decisive factor in the cost of production when such conduct serves to *enhance* the price in interstate commerce of the commodity produced, Congress likewise has the power to regulate intrastate practices respecting a decisive factor in the cost of production when such practices serve unduly to *depress* the price in interstate commerce of the commodity produced [1]—subject, undoubtedly, in each instance to the limitation that the practices may be reasonably regarded as likely to enhance or depress price materially. As to the wisdom of

[1] The practice reached by regulation in *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1, had as one of its effects the *depression* of price.

the determination by Congress that low prices are injurious to interstate commerce, this presents an economic question with which "the courts are both incompetent and unauthorized to deal." See *Nebbia* v. *New York,* 291 U. S. 502, 537. In *Northern Securities Co.* v. *United States,* 193 U. S. 197, 337, this Court said:

> Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this Court need not consider or determine.

Standard Oil Co. v. *United States,* 283 U. S. 163, *supra,* also shows that practices with reference to production do not, as such, lie beyond the scope of the federal commerce power, that they are not so insulated from commerce that whatever concerns them necessarily affects interstate commerce only indirectly. The Court in that case said (p. 169):

> Moreover, while manufacture is not interstate commerce, agreements concerning it which tend to limit the supply or to fix the price of goods entering into interstate commerce, *or* which have been executed for that purpose, are within the prohibitions of the Act.

The question whether the wage and hour provisions of the Bituminous Coal Conservation Act regulates practices which affect interstate commerce so directly as to be subject to federal control is similar to the problems upon which this Court

has passed in litigation arising out of federal regulation of the relations between interstate carriers and their employees. Congress may make it unlawful for interstate carriers to interfere with, restrain, or coerce employees in the designation of representatives for collective bargaining or in self-organization, because such prohibited activity constitutes a threat to the amicable adjustment of disputes between employers and employees which, if not amicably adjusted, may lead to interruptions of interstate commerce. *Texas & New Orleans R. R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548. The intrastate conduct regulated, that is, carrier interference with the free exercise by their employees of the processes incident to collective bargaining, was regarded as affecting interstate commerce sufficiently directly to be within federal power. On the other hand, promoting the morale or contentment of mind of employees of interstate carriers by requiring such carriers to pension employees retired for age was held to be too remote in its effects in improving the efficiency or safety of interstate transportation to come within federal power. *Railroad Retirement Board* v. *Alton Railroad Co.,* 295 U. S. 330.

Cases arising under the Sherman Act show that an intent to restrain interstate commerce may bring within federal power intrastate conduct which, but for such intent, would affect interstate commerce only indirectly. Compare *Coronado*

Coal Co. v. *United Mine Workers of America,* 268 U. S. 295, 310, with *United Mine Workers of America* v. *Coronado Coal Co.,* 259 U. S. 344, 410, 411; *United Leather Workers* v. *Herkert & Meisel Trunk Co.,* 265 U. S. 457, 464–467; and *Industrial Association* v. *United States,* 268 U. S. 64, 82. But cases arising under that Act also show that intrastate conduct may directly affect interstate commerce even though such intent is absent. *United States* v. *Patten,* 226 U. S. 525, 543. That case came before this Court on appeal from a demurrer to an indictment under the Sherman Act charging a conspiracy to purchase on an exchange contracts for the future delivery of cotton in excess of the amount available for delivery on the due dates. This Court said (p. 543) that "by its necessary operation it [the conspiracy] would directly and materially impede and burden the due course of trade and commerce among the States" and that it was therefore immaterial that there was "no allegation of a specific intent to restrain such trade or commerce." In *Industrial Association* v. *United States,* 268 U. S. 64, 81, the Court said that the facts in *United Mine Workers* v. *Coronado Coal Co.,* 259 U. S. 344, *supra,* did not show a conspiracy to restrain interstate commerce in view of "the absence of proof of an intention to restrain it or proof of such *a direct and substantial effect upon it,* that such intention reasonably must be inferred."

In *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1, which sustained federal regulation of grain ex-

changes, the Court considered the validity of the statute as applied to cash grain, sales to arrive, and grain actually delivered in fulfillment of future contracts, separately from the validity of the statute as applied to future contracts which do not result in actual delivery (because of the later purchase of offsetting contracts). As to the former group, the Court held (p. 34) that the case could not be distinguished from the stockyards regulation sustained in *Stafford* v. *Wallace,* 258 U. S. 495, upon the ground that the transactions regulated were in a stream of interstate commerce flowing into a state, resting there temporarily, and then going forward. As to future sales which do not result in actual delivery, the ground of decision was that manipulation of grain futures may produce abnormal price fluctuations which, in turn, "disturb the normal flow of actual consignments" (p. 39) and "directly influence consignment in" interstate commerce (p. 40). The commerce power was therefore held (p. 40) to include control over intrastate transactions where they "affect the country-wide price" of an article and thus affect interstate commerce therein.

Cases upholding federal control of intrastate acts because of their effect upon competition in interstate commerce furnish a close analogy to the regulation under consideration. Section 7 of the Clayton Act makes it unlawful for any corporation engaged in interstate commerce to acquire the stock of another corporation so engaged "where the effect of such acquisition may be to substan-

tially lessen competition" between the corporations. In none of the various cases in which this action has been enforced or interpreted did it appear that the stock acquisition was itself an interstate transaction. *Federal Trade Commission* v. *Western Meat Co.*, 272 U. S. 554; *International Shoe Co.* v. *Federal Trade Commission*, 280 U. S. 291; *Arrow-Hart & Hegeman Electric Co.* v. *Federal Trade Commission*, 291 U. S. 587. See *Northern Securities Co.* v. *United States*, 193 U. S. 197, *supra*.

Section 8 of the Clayton Act further illustrates this type of regulation. The section provides that no person shall be a director in two or more corporations engaged in interstate commerce (if the capital of one of them exceeds $1,000,000) if the competition between the corporations is such that its elimination by agreement would constitute a violation of any provision of the antitrust laws.

Most of the cases arising under Section 5 of the Federal Trade Commission Act which prohibits "unfair methods of competition in [interstate] commerce" have involved practices such as false advertising or unfair use of a trade name which usually have an interstate circulation. Little, if any, attention has been given to this aspect in the cases under this section which have come before this Court, but it would appear that the statute would apply to an unfair method, used wholly intrastate, of competing in interstate commerce. See *Federal Trade Commission* v. *Eastman Kodak*

Company, 7 F. (2d) 994 (C. C. A. 2nd), affirmed on another issue, 274 U. S. 619); *Chamber of Commerce* v. *Federal Trade Commission*, 13 F. (2d) 673 (C. C. A. 8th).

It may, accordingly, be confidently asserted that federal power to regulate practices employed to gain a competitive advantage in interstate commerce is not confined to methods and practices which themselves consist of acts in interstate commerce. But the Government does not contend that, because federal power may embrace such practices, it therefore extends to all. Only those practices which by their necessary effect materially influence competition in interstate commerce or the movement of goods in such commerce may be regulated.

It is for this reason that the Government has summarized at length in this brief the facts and figures regarding the bituminous coal industry which indicate the connection and the nature of the effect which wages and working conditions generally in that industry have upon the interstate commerce in bituminous coal. It is upon these facts that the Government rests its contention that in this industry wages and hours have such a *direct and substantial* effect upon interstate commerce as to bring their regulation within the scope of federal power.

Without attempting at this point to summarize the facts, attention may nevertheless be called

again to special conditions in the industry accentuating the competitive effect of varying wage scales. First, is the fact that labor costs are from 60% to 65% of total cost of production. Second, is the fact that the wage scale of certain operators has been fixed over definite periods of time by collective bargaining agreements while other operators were free to fix their wages, and therefore their prices, at levels which would enable them to undersell the former group of operators.[1] In short, it may truly be said that in this industry wage cutting and price cutting go hand in hand. Producers may cut their wages in order to win particular contracts (R. 348) or they may enter into contracts at prices based upon a future cut in wages, which is then carried out by giving employees the choice between working at a lower wage or not working at all (R. 411).

In discussing the effect of varying wage scales on interstate competition, interstate prices and interstate commerce, the Government has frequently shown these effects by the use of statistics and testimony relating to states or areas. This has been done for two reasons. In the first place, since collective bargaining has, for the most part, been the recognized means of determining the wage scale in certain states and areas and not in others,

[1] In determining the directness of the effect of wage rates upon interstate commerce, the effects attributable to these agreements must be accorded as much weight as any other factor.

the effect on interstate commerce of differing wage scales is most clearly and graphically shown by a comparison on a state basis or an area basis. In the second place, statistical information as to wages, prices, and shipments is available only with respect to states and areas and not for individual producers.

Petitioner (see Br., pp. 37–40, 91–96) erroneously deduces from the Government's use of such data that it rests its support of the regulatory provisions of the Act upon the ground that the federal government may exercise its commerce power to allocate the production of coal among the several states. On the contrary, what the Government is contending is that, in the case of both price cutting and wage cutting causing price cutting, the important consideration is, not the protection of the interstate commerce of Illinois operators as against the interstate commerce of West Virginia operators—to take these states as illustrative of petitioner's point—but the protection of the interstate shipper, wherever located, against the unfair competition in interstate commerce of his wage-cutting competitors, wherever located, whether they are his immediate neighbors or operators in a distant state. Indeed, when the area covered by collective agreements narrowed, the wage-cutting and price-cutting competition which was most severe was that of producers in the same district or area competing with each other in common consuming extrastate

markets. A prominent operator of mines in Ohio, Pennsylvania and West Virginia, testified as follows as to conditions during the period between the termination of the Jacksonville Agreement on April 1, 1927, and the adoption of the N. R. A. code in 1933 (R. 384):

> Instead of having only the competition of the open-shop mines in other districts, the mines were then competing with each other in the same district, *and it got to the point that there was really nothing but chaos in all these fields.* It was in many instances impossible to know what your neighbor was paying in the way of wages, and when you would go out to bid on a piece of business it would be impossible to know whether you would have to bid within 5¢ or 50¢ a ton of the price at which the business would be awarded. There was no stability whatever in the industry all during the period between April 1, 1927 until the fall of 1933.

3. *Under applicable legal principles and decisions, the collective bargaining provisions of the Act are a valid exercise of the commerce power of Congress*

Subsection (a) of Part III of Section 4 requires the insertion in the code of the following condition:

> Employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from interference, restraint, or coercion of employers, or their agents, in the designa-

> tion of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; and no employee and no one seeking employment shall be required as a condition of employment to join any company union.

Petitioner devotes only a single page (p. 132) of his brief to the question of the validity under the commerce power of the above provision.[1] He apparently regards this question as on all fours with the validity under the commerce power of the wage and hour provisions of the Act. Petitioner thus ignores or overlooks the fact that the collective bargaining provisions, in addition to their appropriateness as a means of preventing price-cutting competition in interstate commerce, also constitute a means peculiarly adapted to preventing the disturbance and injury to interstate commerce caused by the numerous and wide-spread strikes which have frequently recurred in the bituminous coal industry.

In supporting the collective bargaining provisions upon the latter ground, questions which may require consideration are whether collective bargaining may reasonably be regarded by Congress as a proper and necessary means to prevent labor disturbances in this industry, and whether the labor disturbances which have characterized the industry

[1] Petitioners in *R. C. Tway Co.* v. *Glenn*, No. 649, entirely ignore this question in their brief.

in the past are of such a character that federal power may be exerted to prevent their occurrence.

Upon the first question *Texas & N. O. R. R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548, would seem to be an authority of great weight. In that case this Court upheld the validity under the commerce power of a section of the Railway Labor Act of 1926, the provisions of which are substantially the same as those of Part III (a) of Section 4 of the Bituminous Coal Conservation Act. The Court there recognized that protecting employees against interference by their employers with self-organization or the processes of collective bargaining was an appropriate means of preventing labor disputes and strikes incident thereto.[1]

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[1] The Railway Labor Act has been remarkably successful in preventing strikes. The *First Annual Report* of the National Mediation Board, established pursuant to the Act of June 21, 1934, c. 691, 48 Stat. 1193, states (p. 8):

> Since the enactment of the Railway Labor Act in 1926 there has been an almost unbroken record of peaceful settlement of labor disputes on the railroads. • • •
>
> That the railroad industry could maintain such a peaceful record, especially since 1932 when strikes and industrial unrest have been prevalent in other industries throughout the country, is testimony to the soundness and effectiveness of the labor policies formulated by Congress in the Railway Labor Act.
>
> • • • • •
>
> But there has been no lack of labor disputes in the railroad industry. It differs from other industries only in that its disputes are amicably adjusted with the aid of the agencies set up by the act.

The Court said (p. 570):

> Exercising this [commerce] authority, Congress may facilitate the amicable settlement of disputes which threaten the service of the necessary agencies of interstate transportation. In shaping its legislation to this end, Congress was entitled to take cognizance of actual conditions and to address itself to practicable measures. * * * It has long been recognized that employees are entitled to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work. *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184, 209. Congress was not required to ignore this right of the employees but could safeguard it and *seek to make their appropriate collective action an instrument of peace rather than of strife.*

But wholly aside from the authority of this case, the facts of record conclusively establish that interference by operators with the right to organize and to bargain collectively has been the primary cause of the many strikes in the bituminous coal industry. In areas where operators have denied these rights, there have been repeated and violent labor disturbances occasioned by such denial. (*Supra, pp.* 214–219.) Likewise, in the case of suspensions of work (the equivalent of strikes) in areas where the right to organize and bargain collectively has been recognized, these suspensions have been

largely caused and greatly prolonged by the fact that such rights were denied in other areas.

The reason for this has been the difficulty of agreeing upon terms when it was known that any wage scale determined upon would be undercut by operators in other areas who, through their denial of collective bargaining, were able to dictate terms of employment to their employees. This difficulty was a major cause of the suspensions periodically occurring in union areas in the pre-war period (Fg. 80, R. 149) and was the direct cause of the major strikes in such areas in 1922 and 1927 (*supra*, pp. 44, 52–53; Fgs. 85, 108, R. 153–154, 169). In fact, the trial court found that a "main cause" of the suspensions which occurred periodically at the expiration of existing wage contracts, and which continued until the parties could reach an agreement upon terms of renewal, has been the fact that "unionized producers have felt themselves unable to meet the wage proposals of the employees because of cutting of price and of wage rates by producers not bound by wage agreements." (Fg. 132, R. 189.)

It is not mere chance that in this industry, to a far greater extent than in industry generally, denial of the right to organize and bargain collectively causes strikes and suspensions. For one thing, the miner's need for the protection given by organization is exceptional. (*Supra*, pp. 204–206.) For another thing, the wage scale is a decisive factor in in-

terstate competition. Accordingly, the issue of recognition of collective bargaining is one of paramount importance to all groups in the industry. It confers upon the operators who do not give such recognition an artificial competitive advantage. In the case of workers whose employers grant such recognition, the withholding of recognition elsewhere is a constant threat and menace. This is so because low-price coal moving in interstate commerce from areas without collective bargaining not only takes business from operators in collective bargaining areas and thus reduces employment opportunities in these areas, but also exerts a constant pressure upon the latter operators to abrogate their collective agreements, to refuse to renew them, or to renew them only upon less favorable terms.

When there is so much at stake, the issue is bound to be fought out with every weapon at command, and the result is recurrent industrial warfare, usually characterized by acts of violence, intimidation and extra-legal action by both operators and workers. It may be said without peradventure that denial of the right to organize and bargain collectively is a direct cause of repeated strikes. If federal power extends to the strikes themselves, as has been held,[1] Congress certainly may deal with their inciting cause.

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[1] *Coronado Coal Co.* v. *United Mine Workers*, 268 U. S. 295, *supra; International Organization* v. *Red Jacket C. C. & C. Co.*, 18 F. (2d) 839, *supra; Pittsburgh Terminal Coal Corp.* v. *United Mine Workers*, 22 F. (2d) 559 (W. D. Pa.).

Since the existence of two classes of mines, some organized and some not, causes major labor disturbances, it may be contended that Congress, instead of dealing with this source of conflict by adopting measures designed to make collective bargaining general throughout the industry, might better have endeavored to eliminate it wholly from the industry. At the time the present Act was passed, 90% of the industry was organized. (Fg. 144, R. 195.) So strong are the motives for trade union organization in the coal mining industry, for reasons already pointed out (*supra,* pp. 204–206), and so general is the miner's insistence on and belief in the right of collective bargaining, that large portions of the American bituminous industry are certain to remain organized. "Congress was entitled to take cognizance of actual conditions and address itself to practicable measures". *Texas & N. O. R. R.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548, 570. In any event, it was for Congress to determine which method it should adopt to achieve stability. It certainly cannot be said that the Congressional choice of guaranteeing freedom from interference with collective organization and bargaining, rather than the adoption of measures to restrict or eliminate such activity, was unreasonable or inappropriate.

There remains the question whether the strikes in this industry, occurring on so many occasions in the past, affect interstate commerce so directly and

substantially that the federal commerce power may be exerted to prevent them. No doubt as to such power exists as to strikes for the purpose of preventing the shipment of coal in interstate commerce; they have been judicially determined to be within federal power. *Coronado Coal Co.* v. *United Mine Workers,* 268 U. S. 295, *supra; International Organization* v. *Red Jacket C. C. & C. Co.,* 18 F. (2d) 839, *supra.* See also *Pittsburgh Terminal Coal Corp.* v. *United Mine Workers,* 22 F. (2d) 559 (W. D. Pa.); *Hitchman Coal and Coke Co.* v. *Mitchell,* 245 U. S. 229, *supra.*

This type of strike is illustrated by the *Coronado, Red Jacket,* and *Hitchman* cases. Extracts have already been set forth from the opinions in these cases which indicate the general nature of the controversies there involved. Of course, the number of instances in which strikes of this kind have given rise to judicial opinions dealing with them under statutes resting on the federal commerce power is no true measure of their importance or frequency. The trial court found that various attempts over a period of several years were made by the miners' union to gain recognition of collective bargaining in areas where recognition was withheld, and found that these attempts, which the operators resisted, "were prompted in a large measure by the competitive pressure exerted by the cutting of wage rates in non-union fields upon the union scale of wages in competing areas" (Fg. 107, R. 167–168). The seri-

ous disorders occurring in West Virginia in 1920 and 1921, to which the *Red Jacket* case relates, are an example of strikes of the kind we are now considering, which are carried on with a purpose to prevent movement of coal in interstate commerce.

Likewise suspensions in the areas in which collective bargaining has been carried on fall properly within the commerce power because, apart from the question of intent, their necessary effect is to halt interstate commerce on a wholesale scale. Even when applying the narrower test of what constitutes a conspiracy in restraint of interstate commerce, this Court has recognized that where intrastate action is of such a character that it necessarily would materially and substantially affect interstate commerce, then those who are parties to a conspiracy operating within the intrastate field, but producing these effects on interstate commerce, are deemed to have intended the necessary consequences of their acts and the conspiracy is held to be within the prohibitions of the Sherman Act. *United States* v. *Patten*, 226 U. S. 525, 543. In *Industrial Association* v. *United States*, 268 U. S. 64, 81, this Court pointed out that *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344, held that a conspiracy to restrain interstate commerce was not established because the evidence did not show either an intent to interfere with such com-

merce or an effect on such commerce "of such substance that a purpose to restrain interstate commerce might be inferred." In the same case the Court said (p. 77):

> The statute is not aimed alone at combinations and conspiracies which contemplate a restraint of interstate commerce, but includes those which directly and unduly cause such restraint in fact.

The table below [1] shows, for eleven of the last thirty-two years, the number of men on strike, the average number of days lost per man on strike, and the percentage which the number of men on strike is of the total number of men employed.

[1] The table is as follows:

(1) Year	(2) No. of men on strike, suspension, etc.[1]	(3) No. of men employed [2]	(4) % of striking employees to total employees [3]	(5) Aver. days lost per man on strike [1]
1904	75,533	438,000	17.2%	44
1906	211,304	478,000	44.3%	63
1908	145,145	516,000	28.2%	38
1910	215,640	556,000	38.8%	89
1912	159,098	549,000	29.0%	35
1914	135,605	584,000	23.2%	80
1919	418,279	622,000	67.2%	37
1922	460,589	688,000	67.1%	117
1927	172,844	594,000	29.1%	153
1928	50,742	522,000	9.7%	83
1932	62,867	406,000	15.4%	120

[1] Fg. 134, R. 190.
[2] Def. Ex. 4A, R. 1006.
[3] Percent which column (2) is of column (3).

The suspension before the war generally closed down mines in from ten to twelve states, and those occurring in 1919 and 1922 affected more than twenty states. (Fgs. 84, 156, R. 152, 202; R. 297; *Bureau of Mines, Coal in 1922,* p. 519). In the two years last mentioned, over 400,000 men were on strike and in 1927, over 172,000 men. (See foregoing table.) Interference with the production and shipment of coal on such a tremendous scale, simultaneously effective in such a large number of states, would seem clearly to obstruct commerce among the states directly and substantially.

Such large-scale suspensions have interrupted and interfered with the normal flow of interstate commerce in various ways. Their direct effect is to prevent, for the period of their duration, shipment of a large proportion of the national supply of coal. Another immediate result is to raise the price of coal. The price increases brought about by the 1919 and 1922 strikes have already been described. (*Supra,* pp. 43–45.) Sometimes, as was the case in 1926, heavy buying in anticipation of a suspension contributed to a sudden rise in spot prices. (Fg. 111, R. 171.)

The suspensions have tended to interfere with the normal course of movement of coal in interstate commerce. Instead of buying coal as they needed it, consumers purchased large amounts in advance of each threatened suspension at considerable additional cost. (Fg. 111, R. 172.) The flow of coal

in the ordinary and customary channels of interstate commerce was broken; shipments from areas not on strike increased, while shipments from the striking areas ceased. The report of the Coal Commission appointed by the President in 1922 described the effect of pre-war suspensions as follows (Vol. III, p. 1291):

> When production was cut off for a time in the Central Competitive Field, it meant that those industries which were customarily supplied by operators in this field had to seek their fuel elsewhere. Fuel was not always forthcoming at a moment's notice and in any event changing the source of supply meant a dislocation of the ordinary channels of trade, sufficient to cause serious apprehension and inconvenience to the business world, and often sharp increases in the price of coal.

The trial court found (Fg. 184, R. 211):

> * * * many strikes and suspensions of work * * * have closed down many mines, some for long periods of time, have caused violent and wide fluctuations in the price of bituminous coal to the consuming public, have caused hardship and put burdens upon many consumers of bituminous coal, have threatened to interrupt and obstruct, and have interrupted and obstructed interstate commerce in bituminous coal, and at times have even threatened to stop such interstate commerce for indefinite periods; have substantially dislocated and diverted

> the normal flow of interstate commerce in such coal, and have obstructed, burdened and restrained interstate commerce in such coal.

It therefore appears that the strikes which have occurred in this industry have been for the most part strikes of a type which are either engaged in for the direct purpose of preventing interstate movement or which, apart from such purpose, directly and substantially affect interstate commerce. Moreover, they have been recurrent and, as long as collective bargaining is not recognized generally throughout the industry, there is every reason to believe that the same conditions of labor instability and unrest and of interferences with interstate commerce will continue in the future.

On the basis of facts of the kind to which we have referred, disclosed in many Congressional investigations, Congress in Section 1 of the Bituminous Coal Conservation Act found:

> the right of mine workers to organize and collectively bargain * * * should be guaranteed * * * in order to avoid those obstructions to its interstate commerce that recur in the industrial disputes over labor relations at the mines.

Concerning the weight to be given to such a Congressional finding, this Court said in *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1, 37 quoting from *Stafford* v. *Wallace,* 258 U. S. 495, 521:

> This court will certainly not substitute its judgment for that of Congress in such a mat-

> ter unless the relation of the subject to interstate commerce and its effect upon it are clearly non-existent.

When the conditions such as we have described exist, Congress is not limited to dealing with the obstructions to interstate commerce after they have actually occurred, when effective relief through legal means is likely to be of little avail. It may take measures to deal with practices which constitute a potential threat. In *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344, 408, this Court, referring to cases upholding regulatory legislation enacted under the commerce power said:

> It is clear from these cases that if Congress deems certain recurring practices, though not really part of interstate commerce, likely to obstruct, restrain or burden it, it has the power to subject them to national supervision and restraint.

In *Stafford* v. *Wallace*, 258 U. S. 495, 520–521, this Court after earlier citation and discussion of like decisions said:

> If Congress could provide for punishment or restraint of such conspiracies after their formation through the Anti-Trust Law as in the *Swift Case*, certainly it may provide regulation to prevent their formation. * * * Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory

power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of the danger and meet it.

Independently of the considerations which have been urged up to this point as to the validity under the commerce power of the collective bargaining provisions as a means of protecting interstate commerce against the interruptions caused by strikes, these provisions can also be supported as an aid to effective administration of the minimum price provisions of the Act. As long as some producers, by denying to their employees the right to organize and bargain collectively, are left free to vary their wage rates at any time as contrasted with producers whose wage rates are fixed at a definite amount and for a definite period by collective agreements, the resulting advantage to the former constitutes a constant temptation to them, by manipulating their wage rates, to sell their coal below the minimum prices established under the provisions of the Act in the expectation of thereby increasing the volume of their business. Prohibiting interference by employers with the right of employees to organize and bargain collectively will therefore aid materially in, and is a reasonable and appropriate means for, carrying out the policy expressed by Congress in the price provisions of the statute, which provisions have been shown to be clearly within its commerce power.

It is for Congress to select the measures it deems essential to effective administration of regulatory provisions enacted under any of its constitutional powers. In facilitating the administration of such regulation Congress may provide for control of intrastate as well as interstate transactions. In *Westfall* v. *United States,* 274 U. S. 256, 259, the Court said:

> Moreover, when it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented it may do so. It may punish the forgery and utterance of spurious interstate bills of lading in order to protect the genuine commerce. *United States* v. *Ferger,* 250 U. S. 199. See further, *Southern Ry. Co.* v. *United States,* 222 U. S. 20, 26. That principle is settled.

B. THE LABOR PROVISIONS OF THE ACT DO NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

1. The minimum wage and maximum hour provisions of the Act are reasonably related to a proper legislative purpose and are not arbitrary, unreasonable, or capricious

The due process clause requires that a law be not unreasonable, arbitrary, or capricious, and that the means which it selects for the objects sought to be attained have a reasonable and substantial relation to such objects. *Nebbia* v. *New York,* 291 U. S. 502, 525. The earlier discussion of the commerce question has shown the relation between wages and

hours in the bituminous coal industry and cut-throat competition in interstate commerce and the disastrous effects of such competition on interstate prices. The regulation is, therefore, reasonably and substantially related to a proper object for Congressional action.

There remains the question whether the wage and hour provisions of the Act are arbitrary, unreasonable, or capricious. The burden of proving a statute arbitrary or unreasonable rests upon the person challenging its constitutionality. *O'Gorman & Young, Inc.*, v. *Hartford Fire Ins. Co.*, 282 U. S. 251; *Metropolitan Casualty Ins. Co.* v. *Brownell*, 294 U. S. 580, 584. Petitioner not only offered no evidence to the effect that the fixing of minimum wages in the bituminous coal industry was unreasonable, but instead testified himself that he did not believe that "without the minimum wage and maximum hour provision any degree of stability could have been achieved in the coal industry."[1] (R. 278.) The testimony of other producers supports this view. (R. 386, 402–403, 408, 413, 418.)

[1] Petitioner testified (R. 278):

"I testified before the subcommittee of the Committee on Interstate Commerce of the United States Senate as follows:

> 'Mr. CARTER. Senator, I do not believe that without the minimum wage and maximum hour provision, any degree of stability could have been achieved in the coal industry. I believe that is the base upon which the coal industry must rely to solve its problems, some base, fixed base of wages and hours, keeping in mind of course that there are equitable differentials and changes in districts

Petitioner's contention therefore rests upon the proposition that although governmental regulation of wages and hours in the coal industry is not unreasonable in fact (as he himself testified), such regulation is *per se* and as a matter of law an unreasonable interference with liberty of contract. In *Nebbia* v. *New York, supra,* this Court rejected precisely this contention (see pp. 531, 535, 538), and it declared broadly (p. 537) that "there can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business *in any of its aspects.*"

The validity under the due process clause of the minimum wage provisions of the present Act is not governed by the decision in *Adkins* v. *Children's Hospital,* 261 U. S. 525, holding that the minimum wage law for the District of Columbia

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that must be preserved in order to prevent a dislocation of the industry and that would injure the operators and all the men concerned.'

"That was my opinion and it is now. I also testified as follows:

'So far as labor is concerned *I am sure there is a unanimity of feeling* that the men and women employed by and dependent upon the industry should not be subjected to a lowering of their standards of living because of unrestrained play of economic forces. It seems obvious and unanswerable that some provision must be made for the protection of these workers, and it would seem that the best sort of protection which could be afforded them would be the maintenance, by statute, of maximum hours of labor and minimum rates of pay.'

"That was my feeling and it is still my feeling."

(Act of September 19, 1918) violated due process requirements. A brief review of those features of the law emphasized in the opinion of the majority of this Court as amounting to denial of due process will show that the Bituminous Coal Conservation Act is not open to the same objections.

First, the Court in the *Adkins* case found (pp. 555–556) that there was no reasonable relation between "the means selected"—the fixing of minimum wages—and "the object sought to be attained", which in that case was protection of the health and morals of women. Under these circumstances, the statute was characterized (p. 554) as "simply and exclusively a price-fixing law."[1] In the instant case, on the other hand, there is clearly a real and substantial relation between providing for uniformity in minimum wage rates among competing coal operators and preventing unfair and injurious price competition in interstate commerce.

Second, the opinion in the *Adkins* case pointed out (p. 557) that the law took account "of the necessities of only one party to the contract", ignoring those of the employer. But the Act now under review provides that minimum wages become bind-

[1] The *Adkins* case is therefore to be distinguished from cases like *Nebbia* v. *New York*, *supra*, and the present case where the price regulation has a real and substantial relation to carrying out the object or objects sought to be attained by the legislation, in which case the statute is not "simply and exclusively" a price-fixing law.

ing only when at least two-thirds of the employers in a district or group of districts have given their assent to an agreement collectively negotiated with employees. The "necessities" of the employer are therefore protected, under this law, by the employers themselves.

Third, the Court in the *Adkins* case adverted (p. 555) to the fact that the law applied to "any and every occupation in the District." In contrast, the Bituminous Coal Conservation Act regulates minimum wages and maximum hours of work in a particular industry, and in relation to the particular problems of and conditions in this industry.

Wolff Packing Co. v. *Industrial Court,* 262 U. S. 522 (which was again before this Court in 267 U. S. 552), is also clearly distinguishable. The hour and wage regulation there involved was invalidated upon the ground that the regulation was "merely a feature of the system of compulsory arbitration" established under the statute and had "no separate purpose." The present Act does not authorize compulsory arbitration.

While the operation of the present law is such that it may partially restrict the freedom of contract of certain employers, the facts to which we have earlier referred show that there is ample justification in fact for this restriction. Without it, those operators who compete most ruthlessly in the matter of price cutting and wage cutting, in effect

compel their competitors to adopt similar destructive practices. The situation in this respect is not unlike cases involving use of unfair methods of competition. In *Federal Trade Commission* v. *Keppel & Bro., Inc.,* 291 U. S. 304, 313, the Court said that "a trader may not, by pursuing a dishonest practice, force his competitors to choose between its adoption or the loss of their trade."

When federal power is exerted to prevent interstate distribution of candy prepared and packaged so that its retail sale can be promoted by appeal to the gambling instinct in children, the candy manufacturer engaged in such a practice is deprived of some measure of his liberty of contract and freedom to manage his own affairs. The restriction upon his freedom may, in fact, be just as detrimental to his business interests as, in the case of bituminous coal producers, is the fixing of a minimum wage rate for all producers in a given area. When the abuses which in the past have attended full freedom of contract in respect of wage-cutting are borne in mind, a reasonably appropriate regulatory measure to prevent these abuses certainly bears none of the indicia of being violative of due process. The view point of the practical operator upon this matter is enlightening. An executive of a large company, operating mines in six different states, testified (R. 402–403):

> There is a wide distinction between wage reductions secured by agreement between groups of employers and groups of em-

> ployees, and wage cutting by an individual operator to secure an advantage against his competitors. When such wage cutting is practiced secretly, as often it is, I think it is more unfair than the practice of giving rebates. The money involved to secure the advantage through wage cutting is furnished by the employees. The money involved to secure the advantage through the giving of rebates is furnished by the employer.

Surely regulation which frees the competitive system from abuses which thus prevent it from functioning so that the efficient are rewarded and the inefficient ultimately eliminated, is not to be regarded as violating due process. And it appears that wage-cutting in this industry did so thwart the beneficial functioning of the competitive system. The Commissioner of Labor Statistics testified (R. 479):

> Experience has shown, however, that the business does not necessarily go to the most efficient operator. It goes to the operator who can cut his costs most and frequently that means the operator who can sweat his labor most and cut his wages most. If we are to have competition in the industry, we must have a plane of competition. We must fix the lower limits below which nobody can go and then the producers must compete with one another on the basis of efficiency and not on the basis of cutting wages below the minimum plane.

The procedure for establishing minimum wages and maximum hours is not arbitrary or unreasonable. The law provides that when two-thirds of the producers by tonnage in any district or group of districts enter into a collective wage agreement with a majority of the workers, the other producers therein shall not pay less than the minimum wages embodied in such agreement. Similar procedure must be followed before maximum hours of work become binding upon any operator. The plain purpose is to protect producers against being compelled by a minority of their competitors to resort to a competitive practice which experience has shown proves progressively destructive to them and to their employees.

Petitioner alleges, however, that any procedure which allows some of the employers and employees to determine the wages and hours in the mines of their competitors is arbitrary and unreasonable. Petitioner invokes the spectre of the power of the majority arbitrarily to force the minority to pay ridiculously low or high wages and cites such cases as *Eubank* v. *Richmond,* 226 U. S. 137, and *Washington ex rel Seattle Title Trust Co.* v. *Roberge,* 278 U. S. 116, to show that such a grant of power violates the due process clause.

The statutes involved in these cases, as well as those involved in all of the State cases cited by petitioner, authorized one group of persons to make rules which would bind others—in effect to legis-

late. In the present law Congress has merely provided that, when in the ordinary course of business a sufficient portion of producers have agreed upon certain terms as a rule for their own conduct, such terms shall constitute a minimum floor for competition affecting interstate commerce in the industry. This point is more fully elaborated in our later discussion (*infra*, pp. 267–275) of the question of delegation of legislative power.

The nature of the collective bargaining agreement is a guarantee that the majority will not agree upon wages or hours arbitrarily or for the purpose of injuring non-signatories. The majority itself must comply with the standards established. Such an agreement is a bargain, made by adverse interests. The employee will not permit the wage scale to be unreasonably low and the employer will not permit it to become unreasonably high. If he should, although other operators in the same district must pay the same minimum wages, he is at a disadvantage in competing with operators in other districts, since the minimum wages are agreed upon on a district basis, as well as with competing fuels. Under the facts of the *Eubank* and *Roberge* cases, there were no such practical limitations upon arbitrary action. In the *Roberge* case, self-interest would not have served to prevent arbitrary and capricious action by the other property owners in the district in prohibiting erection of a home for the aged, inasmuch as it was reasonably certain that

none of the other property owners was interested in building such a home. In the *Eubank* case, the restriction which property owners were authorized to impose applied only to *new* construction, so that two-thirds of the property owners, with houses already built and with no intention to rebuild, could impose restrictions upon persons seeking to erect new buildings without imposing any similar restriction upon themselves. Such power is clearly subject to arbitrary abuse. But there is no such danger when, as in the instant case, the restriction would burden those who determine the standard to the same extent as the minority who must conform to it.

2. The Collective Bargaining provisions of the Act do not violate the due process clause of the Fifth Amendment

Petitioner's sole reference to the question whether the collective bargaining provisions of the Act are consistent with the due process clause is the following: "The provisions of the instant statute for collective bargaining and majority rule completely destroy the correlative rights of employees to choose their own employers and of employers to choose their own employees." (Pet. Br., p. 246.) This description is, of course, wholly inaccurate. The collective bargaining provisions are designed for the purpose of permitting employees to organize and bargain collectively through representatives of

their own choosing, free from interference, restraint or coercion from their employers. The decision of this Court in *Texas & New Orleans R. R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548, precludes any contention that collective bargaining provisions of this character constitute such an arbitrary restriction upon the freedom of contract as to violate the Fifth Amendment. Petitioner (Br., p. 247) classifies the statute sustained in the *Texas & New Orleans* case with others which he says "have been sustained for limited periods and under special circumstances in a few instances" and apparently considers this case as going to the borderline of the law. The decision of the Court in that case gives no warrant for so classifying or describing the statute or the case itself.

B. THE WAGE AND HOUR PROVISIONS OF THE ACT DO NOT CONSTITUTE AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE POWER

Petitioner contends that subsection (g), Part III, Section 4, of the Act (*infra,* pp. 312–313) constitutes an unconstitutional delegation of legislative power. This subsection provides that whenever maximum hours of labor are agreed upon in any contract or contracts between producers of more than two-thirds of the national tonnage and representatives of more than one-half of the employees, such maximum hours of labor shall be accepted by all code members. There is a similar provision that wage agreements made in any district or group of

districts by the same proportions of the producers and employees shall be accepted as the minimum wages by all code members in such district or group of districts. It is the Government's position that these provisions do not delegate legislative power.[1] The producers and employees who enter into wage or hour agreements are not acting in a legislative capacity. They are simply prosecuting their own affairs.

Petitioner's contention that the Congress is here delegating its own power of legislation is made in disregard of what the wage and hour provision of the statute is really dealing with. If Congress were seeking to fix and prescribe the rates and quantum of wages to be paid, or the number of hours to be worked, for the social welfare of the employees, then there would be need for specifying in the statute in mathematical terms the minimum rates of pay or the maximum number of hours to be worked, or else for delegation to an administrative agency with appropriate standards. Here the significant

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[1] It is noteworthy that Congress did not consider that any question of delegation was raised by subsection (g). The report of the Committee on Ways and Means of the House states (H. R. 1800, 74th Cong., 1st Sess., p. 12):

"There is no delegated power to establish maximum hours and minimum wages for labor. The bill specifically grants to employees the right of collective bargaining, and provides that when, as a result of collective bargaining, maximum hours are agreed upon or minimum wages agreed upon such maximum hours and minimum wages shall be effective as set forth in the bill."

and crucial consideration is, that Congress, if required to specify the quantum of wages and of hours in order to deal with the subject matter at all, would be compelled to do just what it wishes to refrain from doing, i. e., to regulate and prescribe wages and hours as conditions of employment from the standpoint of the need and welfare, or the assumed need and welfare, of the workers and thus to enter upon a policy of social legislation in the very field that is the concern of the States. This is what Congress in the statute now before us has carefully refrained from doing. It has not sought to fix wages and hours according to standards of some conception of social desirability or of the needs or the contentment of workers, but it has sought to regulate the standards of competition between enterprisers who ship in interstate commerce.

Thus Congress refers to the wages and hours fixed by agreement among the specified number of competitors and of employees, not to regulate wage scales and hours of employment, but to regulate the *relation,* with respect to such factors, between different groups who compete with each other in interstate commerce. Instead of interfering with the liberty of contract of all competitors, Congress leaves the majority free to make their own bargains and adopts their conjoint action as the standard to be followed by the minority. Only in some such way could Congress confine itself to dealing with the *relation* between wages paid by different competi-

tors and refrain from an effort to fix wages themselves on some assumption of what is fair and desirable from the standpoint of the need or welfare of employees.

In other fields of legislation when the end is to secure uniformity of standards, great weight is necessarily given to the existing practices prevailing among business men. In prescribing forms of insurance policies or of bills of lading, legislatures do not strike out *de novo* and devise standards without regard to what is familiar practice and custom. As the common law defers to and adopts custom, so to a considerable degree must legislators when their aim is to make uniform and universal what heretofore has been merely predominant.

In dealing with the forms of insurance policies or of bills of lading, the legislature can of course set forth explicitly in the statute the provisions which it thus takes over from common or preponderant practice. In such matters, in addition to uniformity, the legislature desires a fixed and established standard not subject to variation. Here, however, Congress desires uniformity without imposition of specific and unvarying standards. It wishes to leave freedom to the full extent that freedom may not destroy the possibility of uniformity. Petitioner's contention that power has here been delegated amounts to a complaint that freedom was not abrogated entirely instead of being curtailed only to a limited extent.

Questions of delegation must always be considered in their particular setting, and the consequences of imposing on the legislature other alternatives than those it has adopted, must be compared from a practical standpoint with the consequences of applying the provisions that the legislature has preferred. Obviously the mode of legislative specification which the petitioner sets up as a constitutional requisite would be more arbitrary, more burdensome and more restrictive of freedom of contract than the much wiser plan which seeks to secure only conformity by the minority to the standards adopted by the free bargaining agreements of the majority.

As already pointed out, the producers and employees who enter into wage and hour agreements are not acting in a legislative capacity; they are simply prosecuting their own affairs. The fallacy in the premise on which petitioner's contention rests lies in the failure to distinguish between a law which grants to some agency or person the right to prescribe regulations or prohibitions governing the conduct of others and a law whose operation is made dependent upon the happening of some future event or upon the future action of individuals in the normal conduct of their own business. The contested provisions of the Act are of the latter type.

Employers and representatives of employees in a large portion of the bituminous coal industry

have been making collective agreements with respect to wages and hours for many years. These agreements determine what shall be done in their own mines, not in the mines of other persons. Subsection (g) does not alter these agreements or change their character. If and when they are made by the requisite percentage of producers and employees, then the declaration of Congress that the wages or the hours embodied in such agreement shall be binding upon other code members becomes operative; and the sole question is as to the power of Congress thus to restrict the freedom of contract of such other code members. By this legislation Congress has not conferred upon a group of operators and employees the power to make laws to govern the conduct of others;[1] it has simply provided that these others shall be subject to certain legal obligations when a specified proportion of producers and employees have, in the ordinary course of their business relations with each other, arrived at certain agreements governing their own conduct.

A statute of this character seems no different in principle from a statute the operation of which is conditioned upon the happening of some future natural phenomenon. The principle does not differ

[1]All of the cases in which the question of delegation of power has been passed on by this Court (including *Eubank* v. *Richmond*, 226 U. S. 137, and *Washington ex rel. Seattle Trust Co.* v. *Roberge*, 278 U. S. 116), and all of the cases in petitioner's brief (pp. 123–124) allowed a person or group of persons to make rules for the conduct of others.

where the operation of a statutory regulation is made to depend upon future human conduct. There would be no delegation if Congress were to provide that whenever foreign manufacturers sell a particular commodity for importation into the United States at prices below a certain figure, the tariff on this commodity should automatically increase a certain amount. Cf. *Field* v. *Clark,* 143 U. S. 649. The problem is no different if the content as well as the operative effect of legislation is made to depend upon such future human conduct; for example, in the case just suggested, the statute might provide that the amount of the tariff increase would be determined by the amount of the decrease in prices by foreign manufacturers—and still it could not be contended that the power was being delegated to foreign merchants to make American law. Cf. *Hampton and Co.* v. *United States,* 276 U. S. 394; *Fallbrook Irrigation District* v. *Bradley,* 164 U. S. 112, 178.

Cases involving federal adoption of State law make it clear that Congress does not delegate its authority because it makes the contents of a federal prohibition depend upon what other people do in managing their own affairs. Congress can no more delegate its authority to a State legislature than to a federal official or to a private individual. (*In re Rahrer,* 140 U. S. 545, 560; *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149, 164.) But Congress can refer in advance to the prescriptions of a valid

State law subsequently enacted solely for the purpose of regulating conduct within the power of the state and adopt those prescriptions as an essential element in a federal offense, and such prospective adoption will not be regarded as a delegation of regulation to the States. The conformity acts, the wild game laws, the Webb-Kenyon Act, the bankruptcy exemption laws, and the election laws are familiar examples. In these laws Congress has not delegated legislative authority to the State; Congress defines the circumstances under which conduct will violate federal law, and provides that one of the circumstances shall be that the offender violates a State law enacted, not to create a new federal offense, but to regulate matters of State concern.

The Conformity Acts in effect since the first Congress in 1789 (see especially Rev. Stat. sec. 914, enacted in 1872) have long provided that in certain respects the federal judicial procedure in suits at common law shall be the same as the procedure prescribed by State law for actions in the courts of the respective States. In *Amy* v. *Watertown* (No. 1), 130 U. S. 301, 320, the Court described the effect of the Conformity Act of 1872 as follows:

> The federal courts are bound hand and foot, and are compelled and obliged by the Federal Legislature to obey the state law.

It has never been thought that the Conformity Act contained any delegation of federal legislative or judicial power to the States. Congress was not

giving the States unfettered discretion to make rules for the federal courts, but was providing that the federal judicial procedure should conform to the rules prescribed by the States, in the management of their internal affairs, for their own judiciary—just as here Congress is not authorizing one group of producers and mine workers to legislate for the remainder, but is providing that the federal regulation shall conform to the terms agreed upon by the majority, in the management of their own businesses, for their own mines.

The Lacey Act (31 Stat. 188, 18 U. S. C. Sec. 392), which forbids the transportation in interstate commerce of any birds "the importation of which is prohibited where such * * * birds have been killed * * * in violation of the laws of the state" is another example of a case in which the operation of a federal statute depends upon the contents of a State law. The State conservation law, enacted for a valid State purpose and not for any federal purpose, names the birds and determines the time of year during which they may not be transported in interstate commerce. No question of delegation of power has ever been raised with respect to this statute. See *Rupert* v. *United States,* 181 Fed. 87; *Bogle* v. *White,* 61 Fed. (2d) 930, certiorari denied, 289 U. S. 737. But the argument that a law of this character contains a delegation of power to the States was rejected by this Court in *Clark Distilling Company* v. *Western*

Maryland Railway, 242 U. S. 311. Mr. Chief Justice White there stated (p. 326):

> The argument as to delegation to the states rests upon a mere misconception. It is true the regulation which the Webb-Kenyon Act contains permits state prohibitions to apply to movements of liquor from one state into another, but the will which causes the prohibitions to be applicable is that of Congress, since the application of state prohibitions would cease the instant the act of Congress ceased to apply.

Section 5515 of the Revised Statutes (repealed in 1894, 28 Stat. 36) penalized the violation by any "officer of an election at which any representative or delegate in Congress is voted for" of any duty imposed by State law. In *Ex parte Siebold,* 100 U. S. 371, the Court sustained this statute against attack on the ground that it delegated federal power to the States, saying (p. 388):

> The State laws which Congress sees no occasion to alter, but which it allows to stand, are in effect adopted by Congress.

See also *In re Coy,* 127 U. S. 731.

In *Hanover National Bank* v. *Moyses,* 186 U. S. 181, which upheld the validity of the Bankruptcy Act of 1898, it was contended that the Act contained an unconstitutional delegation of legislative power because it permitted the allowance to bankrupts of the exemptions prescribed by State laws in force at the time of the filing of the petition.

The Court disposed of this objection shortly (p. 190):

> Nor can we perceive in the recognition of local law in the matter of exemptions, dower, priority of payments, and the like, any attempt by Congress to unlawfully delegate its legislative power. *In re Rahrer, Petitioner,* 140 U. S. 545, 560.

The clearest expression of the difference between a delegation of power and a provision that the federal law conform to the conduct of another body acting within its own jurisdiction and not purporting to exercise any federal power, is found in the dissenting opinion of Mr. Justice Holmes in *Knickerbocker Ice Company* v. *Stewart,* 253 U. S. 149. In a passage not in conflict with the decision of the majority [1] he declared (p. 169):

> I assume that Congress could not delegate to state legislatures the simple power to decide what the law of the United States should be in that district. *But when institutions are established for ends within the power of the States and not for any purpose of affecting the law of the United States, I take*

[1] The ground upon which the majority decision rests was that the constitutional provisions there involved ("The judicial power shall extend to * * * all cases of admiralty and maritime jurisdiction") required uniformity throughout the nation and thus deprived the State of *power* to pass such legislation. The State law would thus have no independent validity apart from the Act of Congress, and thus Congress could not be said to be adopting a State law enacted in the management of the State's own affairs.

it to be an admitted power of Congress to provide that the law of the United States shall conform as nearly as may be to what for the time being exists. A familiar example is the law directing the common-law practice, etc., in the District courts, to "conform, as near as may be, to the practice," etc., "existing at the time" in the State Courts. Rev. Stats. § 914. This was held by the unanimous Court to be binding in *Amy* v. *Watertown*, 130 U. S. 301. See *Gibbons* v. *Ogden*, 9 Wheat. 1, 207, 208, *Cooley* v. *Board of Wardens*, 12 How. 299, 317, 318.

The principle of these cases is equally applicable when Congress adopts the future acts of individuals as when it adopts the future acts of State legislatures. If the contents of the regulations taken over by Congress are within the jurisdiction or power of the party establishing them and not attempts to exercise federal power over other persons, no delegation of authority exists.

In the examples of adoption above enumerated, the State legislatures are of course aware that their judicial procedure and their election, bankruptcy exemption, or wild game laws will subject persons to the operation of federal statutes. This, of course, does not alter the fundamental character of the act of the State legislature. Similarly, the knowledge of coal producers and mine workers that their agreements with respect to wages and hours will subject others to the operation of a fed-

eral statute does not change the nature of their action from the formation of a private contract to an exercise of legislative or governmental power.

V. Separability

IF ANY OF THE PROVISIONS OF THE ACT ARE INVALID, ITS REMAINING PROVISIONS, AS WELL AS THE CODE PROVISIONS CORRESPONDING TO SUCH REMAINING PROVISIONS, ARE SEVERABLE AND VALID.

The test of whether the constitutional provisions of a statute may stand if other sections are declared invalid is whether, standing alone, they "can be given legal effect," and whether "the legislature intended the unobjectionable provisions to stand in case other provisions held bad should fall." *Lynch* v. *United States,* 292 U. S. 571, 586. See also *Dorchy* v. *Kansas,* 264 U.S. 286, 290. "The point is * * * whether they are essentially and inseparably connected in substance—whether the provisions are so interdependent that one cannot operate without the other." *Loeb* v. *Columbia Township Trustees,* 179 U. S. 472, 490 and *Berea College* v. *Kentucky,* 211 U. S. 45, 55–56.

The first of these tests requires little consideration here for the various regulatory provisions of Section 4 of the Act can clearly be given legal effect regardless of the fate of the remainder. If any should be found invalid, they may be stricken from the Act without in any way affecting the others and without making it necessary to rewrite the statute in order to give effect to the remaining

provisions. Thus the price provisions of Part II may be administered as they stand. Similarly the collective bargaining provisions of subsection (a) of Part III can be given their full legal effect if the wage and hour provisions of subsection (g) of Part III should fail.

The intent of Congress that the various provisions of the Act should be separable, the second test applied by the Court, is equally clear. In the first place, the separability clause in Section 15 creates a presumption of separability. This section provides:

> If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act and the application of such provisions to other persons or circumstances shall not be affected thereby.

While a separability clause in a statute "is but an aid to interpretation and not an inexorable command," it creates a "presumption of divisibility; and this presumption must be overcome by considerations that make evident the inseparability of the provisions or clear probability that the legislature would not have been satisfied with the statute unless it had included the invalid part." *Utah Power and Light Co.* v. *Pfost,* 286 U. S. 165, 184–185. See *Railroad Retirement Board* v. *Alton Railroad Co.,* 295 U. S. 330, 362.

Petitioner (Br., p. 129) attempts to apply to this Act the words of the concurring opinion in *Schech-*

ter Poultry Corp. v. *United States,* 295 U. S. 495, 555, that the wage and hour provisions of codes approved under the National Industrial Recovery Act are "its very bone and sinew" and that to take these provisions from such a code "is to destroy it altogether." But there is a vital distinction between the two statutes. The National Industrial Recovery Act required every code approved thereunder to contain certain labor provisions and, apart from this requirement, did not specify in any way the contents of such codes. The Bituminous Coal Conservation Act, on the other hand, incorporates the Bituminous Coal Code in the statute itself as section 4 thereof and includes in this Code regulatory provisions with respect to (1) prices, (2) unfair methods of competition, (3) interference with the employees' right to organize and bargain collectively and (4) minimum wages, maximum hours, and other conditions of employment. On the face of the statute the price provisions, which are set forth in Part II of Section 4 of the Act, and the labor provisions, which constitute Part III of that section, are of equal rank.

Not only did Congress treat the price and the labor provisions as of equal dignity and rank, but each is administered and enforced by a separate agency. The National Bituminous Coal Commission administers and enforces the price provisions of Part II and the Bituminous Coal Labor Board the labor provisions of Part III. The administra-

tion of the two sets of provisions by separate enforcement agencies is a further indication of their separate and independent character. In view of the peculiar arrangement of the provisions of the statute, with all the substantive regulatory provisions embodied in Section 4, no inference of nonseparability is to be drawn from the fact that the price and the labor provisions are both found in Section 4. (See Pet. Br., p. 128.) The division of Section 4 into three parts, each, in general, of greater length and importance than the individual sections of the statute other than Section 4, has the same effect as, in the case of an ordinary statute, placing different provisions in different sections.

In earlier sections of this brief the regulatory provisions of Section 4 have been taken up in turn and it has been shown that all are directed toward the end of removing burdens upon and obstructions to interstate commerce in coal by eliminating destructive competition. It has also been shown that such an end is reasonably and appropriately promoted to a greater or less degree (1) by the price provisions, (2) by the provisions for collective bargaining, and (3) by the provisions for standardizing labor costs through standardization of wages and hours. All these means in conjunction would doubtless be more effective in achieving the end desired than would any one of them standing alone, but it cannot be assumed that Congress in-

tended to abandon all three means of promoting its end in case one of them should be adjudged invalid. The proper inference would be exactly the reverse.

Any possible doubt as to the purpose of Congress to make the price provisions separable from the wage and hour provisions would seem to be set at rest by the fact that the Act contemplates that prices may be fixed thereunder when wages and hours are not. The minimum prices which are to be put into effect apply to all producers who accept the code. But a producer accepting the code may pay what wages he pleases and may determine at will how many hours his employees shall work, unless and until specified groups of employers and employees agree upon these matters; and upon termination of any such agreement, the producer is again at liberty until a new agreement applicable to him is entered into. A producer may therefore be bound to observe the minimum prices which are to be established without being similarly bound with reference to his wage payments or the hours of work of his employees. This shows that Congress intended the two sets of provisions to operate independently of one another.

In support of his contention that the price and labor provisions are inseparable, petitioner contends that the price provisions have a "predominant labor motive" and cites as confirmation of this that "the statute expressly states that the prices are to be fixed as provided 'in order to sus-

tain the stabilization of wages, working conditions and maximum hours of labor.'" (Pet. Br., pp. 136–137.) This, he says, makes it clear that the price provisions are enacted in aid of the labor provisions. However, the statute does not state that price regulation is to be for this purpose. The phrase which petitioner quotes comes at the beginning of the provision which sets up the standards to be followed by the price regulating authority. The full language is as follows:

> In order to sustain the stabilization of wages, working conditions, and maximum hours of labor, said prices shall be established so as to yield a return per net ton for each district in a minimum price area * * *, equal as nearly as may be to the weighted average of the total costs, per net ton, determined as hereinafter provided, of the tonnage of such minimum price area.

It is apparent that the words in question do not set forth the purpose of the establishment of minimum prices, but constitute an explanation of the choice of average cost per ton as the basis for determining minimum prices. They amount to a direction that minimum prices are not to be established at a level so low as to induce wage cutting and thus to lead to revival of the very labor disputes and conflicts which have hitherto helped to destroy the equilibrium of the industry. It is quite natural that the price provisions of the statute should not neglect this objective of avoiding stoppages and ob-

structions to interstate commerce, which is one of the objectives of the labor provisions also; to this end it is appropriate that the statute itself give notice to the price regulatory authority that the labor element in cost should be dealt with so as to assure stability rather than to promote instability.

It scarcely seems necessary to argue that subsection (a) of Part III of Section 4, which protects the right of employees to bargain collectively free from the domination or interference of employers, is separable from the wage and hour provisions of subsection (g) of Part III. We have previously set forth the independent relationship of the two sets of provisions to interstate commerce. From the standpoint of protection of the interests of workers in the industry, they are equally independent. The former subsection is designed to make collective bargaining a fair and serviceable instrumentality for the adjustment of differences between employers and employees with reference to terms of employment and thereby to minimize the danger of stoppages of commerce. The latter protects certain agreements made through the collective bargaining process, by extending their scope to other producers, so as to remove one of the most potent causes of price cutting competition.

Obviously, the statutory guarantee of freedom of collective bargaining could stand alone and work towards the accomplishment of its intended objective entirely apart from the existence or opera-

tion of the wages and hours provision of the statute. In exactly the same way the wages and hours provision as it stands does not depend upon the statutory guarantee of collective bargaining, since the wages and hours provision would come into operation if collective bargaining were practiced apart from statutory guarantee and since, furthermore, it comes into operation when only a portion of the industry practices collective bargaining.

Petitioner (Br., p. 128), relying upon the fact that the separability section of the Act speaks of "provisions of this Act" and does not specifically use the word "code," urges that, even though the Act itself be severable, it nevertheless defines what the code should contain, and thus treats the code as a single document. The contention is that the Act imposes a tax for failure to accept a code, the provisions of which the statute specifies, and that, if any part of the required code provisions are invalid, the code fails as a whole.

These contentions ignore the fact that the code for which the Act provides is simply the *alter ego* of the statute—a name for its substantive regulatory provisions. Grouping these provisions together into a code and requiring their "acceptance" is a mere administrative device for enforcement. The provisions of the code are nothing but provisions of the Act itself. If the provisions of the Act are separable, the provisions of the code, being provisions of the Act, must be regarded as

equally separable. Thus, if the statutory provision containing a certain code requirement should be shorn away, wiped out, as it were, from the statute, because of constitutional infirmity, and if the other parts of the statute specifying other code requirements are separable, then the latter statutory provisions stand, and the statute as it is left calls for a code which conforms to the valid statutory provisions.

Since every important substantive regulatory feature of the Act appears in the Act only as a provision of the code, it follows that an attempt to interpret the separability section of the Act as not applying to the code is an attempt to make the separability section to all intents meaningless. A construction which would thus render the separability section practically nugatory should certainly be avoided unless clearly required by explicit language. Not only are there no words suggesting this construction, but other provisions of the Act point in the opposite direction. Thus the highly important provision of Section 3 of the Act provides that acceptance of the code or of the 90% drawback from the tax shall not estop any producer "from contesting the constitutionality of any provision of said *code.*" This clearly contemplates that some provision or provisions of the code as well as of the Act may be attacked as unconstitutional without attacking the code as a whole, an impossible result unless the code is separable.

VI. The Injunction Below

THE TRIAL COURT ERRED IN PERMANENTLY ENJOINING COLLECTION OF 90% OF THE TAXES ACCRUING PRIOR TO THE ENTRY OF ITS DECREE

Although the trial court held that severable portions of the Act were constitutional and dismissed petitioner's bill, it granted a permanent injunction restraining the collection of taxes in excess of 1½% of the sale price of coal at the mine accruing between November 1, 1935, the effective date of the taxes imposed by the Act (Sec. 20), and December 10, 1935, the date of the trial court's decree. Apparently the court regarded the doctrine announced in *Ex parte Young*, 209 U. S. 123, as applicable to the taxes in excess of 1½% accruing during this period. The Government submits that this portion of the decree, which is before this Court in No. 651, is erroneous.

Ex parte Young held that a statute which imposed heavy cumulative penalties for violation of rates for railroad transportation fixed by statute, when no right to obtain a prior judicial review of the constitutionality of the rates was given, violated due process, since the necessary effect of the legislation was "to preclude a resort to the courts". But the doctrine of this case and of the cases following it applies only to statutes or administrative orders which subject a person to severe penalties without affording a judicial review of the validity of the statute or order before liability for the penal-

ties attach. *Chesapeake & Ohio Railroad* v. *Conley,* 230 U. S. 513, 521–522; *Gulf, Colorado & Santa Fe R. R.* v. *Texas,* 246 U. S. 58, 62; *St. Louis, Iron Mountain & Southern R. R.* v. *Williams,* 251 U. S. 63, 65–66. While there are other limitations upon the scope of the doctrine, this one is sufficient for present purposes.

Section 3 of the Bituminous Coal Conservation Act provides expressly that no producer shall, by reason of his acceptance of the code or of the drawback of taxes, be held to be precluded or estopped from contesting the constitutionality of any provision of the code or its validity as applicable to him. The form of acceptance promulgated by the National Bituminous Coal Commission follows the language of Section 3. (Pl. Ex. 16, R. 804.) A producer who accepts the code is therefore relieved of the tax in excess of 1½% and he is at the same time left free to assert all his constitutional rights. Such filing imposes no injury whatever upon the producer because he will not become liable for payment of the full 15% tax unless and until he fails to comply with the code and the Commission, after a hearing and thirty days' written notice to the member, issues an order revoking his code membership. (Sec. 5 (b), *infra,* p. 313.) Such an order is subject to review in the courts and the reviewing court may affirm, modify or set aside the Commission's order, in whole or in part, and may in its discretion stay the operation of the Commission's

order. (Sec. 6 (b), *infra,* p. 315.) If a stay is granted, the member's right to a drawback of 90% of the tax would continue until the order or revocation of membership had been affirmed by the highest court of review.

Petitioner may contend that these provisions for judicial review are not adequate because, if a producer pursues the statutory remedy and if the Commission's order is affirmed without modification, he would be required to pay the full 15% tax as a condition of restoration of membership, for the time during which the Commission found that his violation of the code had continued. (Sec. 5 (c), *infra,* p. 314.) But the producer, in the proceedings to review the Commission's order, would be free to assert any defence based upon the doctrine of *Ex parte Young* and, if the court found that the defence was well founded in law and in fact, the reviewing court could modify the effective date of the Commission's order of revocation of membership, or otherwise modify the order so as to prevent application of the tax provisions of the Act in an unconstitutional manner.

Petitioner had the choice either of permitting the company of which he is a stockholder to accept the code and thereafter test the constitutionality of its provisions by the procedure therein provided, a procedure which, as we have shown, would have preserved to the company all its constitutional rights, or to enjoin the company from accepting

the code and run the risk that the company be subject to the tax during the period of litigation. Petitioner, having chosen the latter course and having by his own conduct precluded the company from employing the adequate statutory remedy, cannot now assert that it should be relieved of payment of the taxes which the statute imposes upon those who do not accept the code. *Wadley Southern Railway* v. *Georgia*, 235 U. S. 651, 669.

It should be borne in mind in this connection that, as against the burden which payment of the full tax during the period of litigation would impose upon the Carter Coal Company, its freedom from the obligations imposed by the Act upon code members gives it certain competitive advantages which may be of great pecuniary benefit. Not only is it free to engage in various methods of competition prohibited to code members by Part II (i) of Section 4 but, what is much more important, it is free to sell coal under contracts providing for delivery more than thirty days from the contract date, whereas Part II (e) of Section 4 prohibits code members from making such contracts prior to the establishment of minimum prices under the Act.[1] Freedom from the latter requirement is of very great competitive importance since 75% of all bituminous coal is sold under contracts calling for delivery over a period of several months to a year (Fg. 56, R. 136–137).

[1] Minimum prices have not as yet been put into effect.

CONCLUSION

It is respectfully submitted that that portion of the final decree of the Supreme Court of the District of Columbia dismissing the bill of complaint herein should be affirmed, upon the ground that all the regulatory provisions here in issue are constitutional. It is also submitted that that portion of the decree which grants a permanent injunction against collection of those taxes imposed by the Bituminous Coal Conservation Act, in excess of ten per cent thereof, which accrued prior to December 10, 1935, the date of the decree below, should be reversed.

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APPENDIX

The Bituminous Coal Conservation Act of 1935, approved August 30, 1935, Public, No. 402, 74th Congress, provides—

> That it is hereby recognized and declared that the mining of bituminous coal and its distribution by the producers thereof in and throughout the United States are affected with a national public interest; that the service of bituminous coal in relation to the industrial activities, the transportation facilities, the health and comfort of the people of the United States; the conservation of bituminous coal deposits in the United States by controlled production and economical mining and marketing; the maintenance of just and rational relations between the public, owners, producers, and employees; the right of the public to constant and ample supplies of coal at reasonable prices; and the general welfare of the Nation require that the bituminous coal industry be regulated as herein provided.
>
> It is further recognized and declared that all production of bituminous coal and distribution by the producers thereof bear upon and directly affect its interstate commerce and render regulation of all such production and distribution imperative for the protection of such commerce and the national public service of bituminous coal and the normal governmental revenues derivable from such industry; that the excessive facilities for the production of bituminous coal and the over-

expansion of the industry have led to practices and methods of production, distribution, and marketing of such coal that waste such coal resources of the Nation, disorganize the interstate commerce in such coal and portend the destruction of the industry itself, and burden and obstruct the interstate commerce in such coal, to the end that control of such production and regulation of the prices realized by the producers thereof are necessary to promote its interstate commerce, remove burdens and obstructions therefrom, and protect the national public interest therein; that practices prevailing in the production of bituminous coal directly affect its interstate commerce and require regulation for the protection of that commerce, and that the right of mine workers to organize and collectively bargain for wages, hours of labor, and conditions of employment should be guaranteed in order to prevent constant wage cutting and the establishment of disparate labor costs detrimental to fair competition in the interstate marketing of bituminous coal, and in order to avoid those obstructions to its interstate commerce that recur in the industrial disputes over labor relations at the mines.

NATIONAL BITUMINOUS COAL COMMISSION

SEC. 2. (a) There is hereby established in the Department of the Interior a National Bituminous Coal Commission (herein referred to as "Commission"), which shall be composed of five members appointed by the President, by and with the advice and consent of the Senate, for a term of four years or until the prior termination of this title. The Commission shall annually designate its chairman, and shall have a seal which shall

be judicially recognized. Any person appointed to fill a vacancy shall be appointed only for the unexpired term of his predecessor in office. The Commission shall have an office in the city of Washington, District of Columbia, and shall convene at such times and places as the majority of the Commission shall determine. The members of the Commission shall have no financial interest, direct, or indirect, in the mining, transportation, or sale of, or manufacture of equipment for, coal, oil, or gas, or in the generation, transmission, or sale of hydroelectric power, or in the manufacture of equipment for the use thereof, and shall not engage in any other business, vocation, or employment. Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. The Commission shall, with due regard to the provisions of the civil-service laws or the Classification Act of 1923, as amended, appoint and fix the compensation and duties of a secretary and necessary clerical and other assistants, none of whom shall be related to any member of the Commission by marriage or within the third degree by blood. The members of the Commission shall each receive compensation at the rate of $10,000 per year and necessary traveling expenses. Such Commission shall have the power to make and promulgate all reasonable rules and regulations for carrying out the provisions of this Act, and shall annually make full report of its activities to the Secretary of the Interior for transmission to Congress. Upon all matters within its jurisdiction coming before it for determination, it shall have the power and duty of hearing evidence and finding facts upon which its orders and action may be predi-

cated, and its findings of fact supported by any substantial evidence shall be conclusive upon review thereof by any court of the United States.

(b) (1) There shall be an office in the Department of the Interior to be known as the office of the Consumers' Counsel of the National Bituminous Coal Commission. The office shall be in charge of a counsel to be appointed by the President, by and with the advice and consent of the Senate. The counsel shall have no financial interest, direct or indirect, in the mining, transportation, or sale of, or the manufacture of equipment for, coal, oil, or gas, or in the generation, transmission, or sale of hydroelectric power, or in the manufacture of equipment for the use thereof, and shall not engage in any other business, vocation, or employment. The counsel shall receive compensation at the rate of $10,000 per year and necessary traveling expenses.

(2) It shall be the duty of the counsel to appear in the interest of the consuming public in any proceeding before the Commission and to conduct such independent investigation of matters relative to the bituminous coal industry and the administration of this Act as he may deem necessary to enable him properly to represent the consuming public in any proceeding before the Commission. In any proceeding before the Commission in which the counsel has entered an appearance, the counsel shall have the right to offer any relevant testimony and argument, oral or written, and to examine and cross-examine witnesses and parties to the proceeding, and shall have the right to have subpena or other process of the Commission issue in his behalf. Whenever the counsel finds that it

is in the interest of the consuming public to have the Commission furnish any information at its command or conduct any investigation as to any matter within its authority, then the counsel shall so certify to the Commission, specifying in the certificate the information or investigation desired. Thereupon the Commission shall promptly furnish to the counsel the information or promptly conduct the investigation and place the results thereof at the disposal of the counsel.

(3) Within the limitations of such appropriations as the Congress may from time to time provide, the counsel is authorized, with due regard to the civil service laws and the Classification Act of 1923, as amended, to appoint and fix the compensation and duties of such assistants and clerks, and is authorized to make such expenditures, as may be necessary for the performance of the duties vested in him.

TAX ON BITUMINOUS COAL

SEC. 3. There is hereby imposed upon the sale or other disposal of all bituminous coal produced within the United States an excise tax of 15 per centum on the sale price at the mine, or in the case of captive coal the fair market value of such coal at the mine, such tax, subject to the later provisions of this section, to be payable to the United States by the producers of such coal, and to be payable monthly for each calendar month, on or before the first business day of the second succeeding month, and under such regulations, and in such manner, as shall be prescribed by the Commissioner of Internal Revenue: *Provided,* That in the case of captive coal produced as aforesaid, the Commis-

sioner of Internal Revenue shall fix a price therefor at the current market price for the comparable kind, quality, and size of coals in the locality where the same is produced: *Provided further,* That any such coal producer who has filed with the National Bituminous Coal Commission his acceptance of the code provided for in section 4 of this Act, and who acts in compliance with the provisions of such code, shall be entitled to a drawback in the form of a credit upon the amount of such tax payable hereunder, equivalent to 90 per centum of the amount of such tax, to be allowed and deducted therefrom at the time settlement therefor is required, in such manner as shall be prescribed by the Commissioner of Internal Revenue. Such right or benefit of drawback shall apply to all coal sold or disposed of from and after the day of the producer's filing with the Commission his acceptance of said code in such form of agreement as the Commission may prescribe. No producer shall by reason of his acceptance of the code provided for in section 4 or of the drawback of taxes provided in section 3 of this Act be held to be precluded or estopped from contesting the constitutionality of any provision of said code, or its validity as applicable to such producer.

BITUMINOUS COAL CODE

SEC. 4. The provisions of this section shall be formulated by the Commission into a working agreement, to be known as the "Bituminous Coal Code", and herein referred to as the "Code." Producers accepting and operating under its provisions are herein referred to as "Code members."

For the purpose of carrying out the declared policy of this Act, the code shall contain the following conditions, provisions, and obligations which will tend to regulate interstate commerce in bituminous coal and transactions directly affecting interstate commerce in bituminous coal:

PART I—ORGANIZATION AND PRODUCTION

(a) Twenty-three district boards of coal producers shall be organized. Each district board shall consist of not less than three nor more than seventeen members. The number of members of the district board shall, subject to the approval of the Commission, be determined by the majority vote of the district tonnage during the calendar year 1934 represented at a meeting of the producers of the district called for the purpose of such determination and for the election of such district board; and all known producers within the district shall be given notice of the time and place of the meeting. All but one of the members of the district board shall be producers or representatives of producers truly representative of all the mines of the district. The number of such producer members shall be an even number. One-half of such producer members shall be elected by the majority in number of the producers of the district represented at the aforesaid meeting. The other producer members shall be elected by votes cast in the proportion of the annual tonnage output for the preceding calendar year of the producers in the district, with the right on the part of the producers to vote their tonnage cumulatively: *Provided,* That not more than one officer or employee of any producer within a

district shall be a member of the district board at the same time. The remaining member of each district board shall be selected by the organization of employees representing the preponderant number of employees in the industry of the district in question. The term of district board members shall be two years and until their successors are elected.

In case any marketing agency comprising a substantial number of code members in any producing field within a district establishes, to the satisfaction of the Commission, that it has no representation upon the district board and that it is fairly entitled thereto, the Commission may, in its discretion, after hearing, increase the membership of such district board so as to provide for such representation.

Marketing agencies may be established or maintained within any district by a voluntary association of producers within any producing field therein, as such producing field may be defined by the district board, and function under such general rules and regulations as may be prescribed by the district board, with the approval of the Commission, for the purpose of marketing their coal with due respect for the standards of unfair competition as defined in this Act. Each such marketing agency shall impose no unreasonable or inequitable conditions of membership and shall be truly representative of at least one-third of the tonnage of any producing field or group of producing fields.

The term "marketing agency" or "agencies" as used in this Act shall include any trade association of coal producers complying with the requirements of a marketing agency and exercising the functions thereof.

The district boards and marketing agencies shall each have power to adopt bylaws and rules of procedure, subject to approval of the Commission, and to appoint officers from their own membership, to fix their terms and compensation, to provide for reports, and to employ such committees, employees, arbitrators, and other persons necessary to effectuate their purposes. Members of the district board shall serve, as such, without compensation, but may be reimbursed for their reasonable expenses. The territorial boundaries or limits of such twenty-three districts are set forth in the schedule entitled "Schedule of Districts" and annexed to this Act: *Provided*, That the terirtorial boundaries or limits of any district or districts may be changed, or said districts may be divided or consolidated, after hearing, by the Commission.

(b) The expense of administering the code by the respective district boards shall be borne by those subject to the jurisdiction of such boards, respectively, each paying his proportionate share, as assessed, computed on a tonnage basis, in accordance with regulations prescribed by such boards with the approval of the Commission. Such assessments may be collected by the district board by action in any court of competent jurisdiction.

(c) Nothing contained in this Act shall constitute the members of a district board partners for any purpose. Nor shall any member of a district board be liable in any manner to anyone for any act of any other member, officer, agent, or employee of the district board. Nor shall any member of a district board, exercising reasonable diligence in the conduct of his duties under this Act, be liable to anyone for any action or

omission to act under this Act, except for his own willful misfeasance, or for nonfeasance involving moral turpitude.

PART II—MARKETING

The district boards and code members shall accept and be subject to the jurisdiction of the Commission to approve or to fix minimum and maximum prices, as follows:

(a) All code members shall, in their respective districts, report all spot orders to the district board and shall file with it copies of all contracts for the sale of coal, copies of all invoices, copies of all credit memoranda, and such other information concerning the preparation, cost, sale, and distribution of coal as the Commission may authorize or require. All such records shall be held by the district board as the confidential records of the code member filing such information.

Each district board may set up and maintain a statistical bureau, and the district board may require that such reports and other information in this subsection described shall be filed with such statistical bureau in lieu of the filing thereof with the district board.

Each district board shall, from time to time on its own motion or when directed by the Commission, establish minimum prices free on board transportation facilities at the mines for kinds, qualities, and sizes of coal produced in said district, with full authority, in establishing such minimum prices, to make such classification of coals and price variations as to mines and consuming market areas as it may deem necessary and proper. In order to sustain the stabilization of wages, working conditions, and maxi-

mum hours of labor, said prices shall be established so as to yield a return per net ton for each district in a minimum price area, as such districts are identified and such area is defined in the subjoined table designated "Minimum-price area table", equal as nearly as may be to the weighted average of the total costs, per net ton, determined as hereinafter provided, of the tonnage of such minimum price area. The computation of the total costs shall include the cost of labor, supplies, power, taxes, insurance, workmen's compensation, royalties, depreciation, and depletion (as determined by the Bureau of Internal Revenue in the computation of the Federal income tax) and all other direct expenses of production, coal operators' association dues, district board assessments for Board operating expenses only levied under the code, and reasonable costs of selling and the cost of administration.

MINIMUM-PRICE-AREA TABLE

Area 1: Eastern Pennsylvania, district 1; western Pennsylvania, district 2; northern West Virginia, district 3; Ohio, district 4; Michigan, district 5; Panhandle, district 6; Southern numbered 1, district 7; Southern numbered 2, district 8; West Kentucky, district 9; Illinois, district 10; Indiana, district 11; Iowa, district 12; that part of Southeastern district 13, comprising Van Buren, Warren, and McMinn Counties in Tennessee.

Area 2: Southeastern, district 13, except Van Buren, Warren, and McMinn Counties in Tennessee.

Area 3: Arkansas-Oklahoma, district 14.

Area 4: Southwestern, district 15.

Area 5: Northern Colorado, district 16; southern Colorado, district 17; New Mexico, district 18.

Area 6: Wyoming, district 19; Utah, district 20.

Area 7: North Dakota and South Dakota, district 21.

Area 8: Montana, district 22.

Area 9: Washington, district 23.

The minimum prices so established shall reflect, as nearly as possible, the relative market value of the various kinds, qualities, and sizes of coal, shall be just and equitable as between producers within the district, and shall have due regard to the interests of the consuming public. The procedure for establishment of minimum prices shall be in accordance with rules and regulations to be approved by the Commission.

A schedule of such minimum prices, together with the data upon which they are computed, including, but without limitation the factors considered in determining the price relationship, shall be submitted by the district board to the Commission, which may approve, disapprove, or modify the same to conform to the requirements of this subsection, and such approval, disapproval, or modification shall be binding upon all code members within the district, subject to such modification therein as may result from the coordination provided for in the succeeding subsection (b): *Provided,* That all minimum prices established for any kind, quality, or size of coal for shipment into any consuming market area shall be just and equitable as between producers within the district: *And provided further,* That no minimum price shall be established that permits dumping.

As soon as possible after its creation, each district board shall determine the weighted average of the total costs of the ascertainable tonnage produced in the district in the calendar year 1934. The district board shall adjust the average costs so determined, as may be necessary to give effect to any changes in wage rates, hours of employment, or other factors substantially affecting costs, exclusive of seasonal changes, so as to reflect as accurately as possible any change or changes which may have been established since January 1, 1934. Such determination and the computations upon which it is based shall be promptly submitted to the Commission by each district board in the respective minimum-price area. The Commission shall thereupon determine the weighted average of the total costs of the tonnage for each minimum-price area in the calendar year 1934, adjusted as aforesaid, and transmit it to all the district boards within such minimum-price area. Said weighted average of the total costs shall be taken as the basis for the establishment of minimum prices to be effective until changed by the Commission. Thereafter, upon satisfactory proof made at any time by any district board of a change in excess of 2 cents per net ton of two thousand pounds in the weighted average of the total costs in the minimum-price area, exclusive of seasonal changes, the Commission shall increase or decrease the minimum prices accordingly. The weighted average figures of total cost determined as aforesaid shall be available to the public.

Each district board shall, on its own motion or when directed by the Commission, establish reasonable rules and regulations incidental to the sale and distribution of coal by

code members within the district. Such rules and regulations shall not be inconsistent with the requirements of this section and shall conform to the standards of fair competition hereinafter established. Such rules and regulations shall be submitted by the district board to the Commission with a statement of the reasons therefor, and the Commission may approve, disapprove, or modify the same, and such approval, disapproval, or modification shall be binding upon all code members within the district.

(b) District boards shall, under rules and regulations established by the Commission, coordinate in common consuming market areas upon a fair competitive basis the minimum prices and the rules and regulations established by them, respectively, under subsection (a) hereof. Such coordination, among other factors, but without limitation, shall take into account the various kinds, qualities, and sizes of coal, and transportation charges upon coal. All minimum prices established for any kind, quality, or size of coal for shipment into any consuming market area shall be just and equitable, and not unduly prejudicial or preferential, as between and among districts, and shall reflect, as nearly as possible, the relative market values, at points of delivery in each common consuming market area, of the various kinds, qualities and sizes of coal produced in the various districts; to the end of affording the producers in the several districts substantially the same opportunity to dispose of their coals upon a competitive basis as has heretofore existed. The minimum prices established as a result of such coordination shall not, as to any district, reduce or increase the return per net ton

upon all the coal produced therein below or above the minimum return as provided in subsection (a) of this section by an amount greater than necessary to accomplish such coordination, to the end that the return per net ton upon the entire tonnage of the minimum price area shall approximate and be not less than the weighted average of the total costs per net ton of the tonnage of such minimum price area. Such coordinated prices and rules and regulations, together with the data upon which they are predicated, shall be submitted to the Commission, which may approve, disapprove, or modify the same to establish and maintain such fair competitive relationship, and such approval, disapproval, or modification shall be binding upon all code members within the affected districts. No minimum price shall be established that permits dumping. On the petition of any district board or other party in interest or on its own motion, after notice to the district boards, the Commission may at any time conduct hearings to determine whether the foregoing method of fixing minimum prices under subsection (a) is prejudicial to any district with respect to the fair opportunity of such district to market its coal. Should the Commission so find, and further find that the prejudice cannot be removed through the coordination of minimum prices as provided for in this subsection (b), then the Commission may establish a different basis for determining minimum prices in such district, to the end that fair and competitive prices shall prevail in the marketing of the coal produced in such district: *Provided,* That the minimum prices so established as to any such district shall yield a return, per net

ton, not less than the weighted average of the total costs per net ton, of the tonnage of such district.

(c) When, in the public interest, the Commission deems it necessary to establish maximum prices for coal in order to protect the consumer of coal against unreasonably high prices therefor, the Commission shall have the right to fix maximum prices free on board transportation facilities for coal in any district. Such maximum prices shall be established at a uniform increase above the minimum prices in effect within the district at the time, so that in the aggregate the maximum prices shall yield a reasonable return above the weighted average total cost of the district: *Provided,* That no maximum price shall be established for any mine which shall not return cost plus a reasonable profit.

(d) If any code member or district board, or any State or political subdivision of a State, shall be dissatisfied with such coordination of prices or rules and regulations, or by a failure to establish such coordination of prices or rules and regulations, or by the maximum prices established for him or it pursuant to subsection (c) of this section, he or it shall have the right, by petition, to make complaint to the Commission, and the Commission shall, under rules and regulations established by it, and after notice and hearing, make such order as may be required to effectuate the purpose of subsections (b) and (c) of this section, which order shall be binding upon all parties in interest. Pending final disposition of such petition, and upon reasonable showing of necessity therefor, the Commission may make such preliminary or temporary order as in its judgment

may be appropriate, and not inconsistent with the provisions of this Act.

(e) Subject to the exceptions provided in section 12 of this Act, no coal shall be sold or delivered at a price below the minimum or above the maximum therefor approved or established by the Commission, and the sale or delivery of coal at a price below such minimum or above such maximum shall constitute a violation of the code.

Subject to the exceptions provided in section 12 of this Act, a contract for the sale of coal at a price below the minimum or above the maximum therefor approved or established by the Commission at the time of the making of the contract shall constitute a violation of the code, and such contract shall be invalid and unenforceable.

From and after the date of approval of this Act, until prices shall have been established pursuant to subsections (a) and (b) of part II of this section, no contract for the sale of coal shall be made providing for delivery for a period longer than thirty days from the date of the contract.

While this Act is in effect no code member shall make any contract for the sale of coal for delivery after the expiration date of this Act at a price below the minimum or above the maximum therefor approved or established by the Commission and in effect at the time of making the contract.

The minimum prices established in accordance with the provisions of this section shall not apply to coal sold by a code member and shipped outside the domestic market. The domestic market shall include all points within the continental United States and Canada, and car-ferry shipments to the Island of Cuba. Bunker coal delivered to

steamships for consumption thereon shall be regarded as shipped within the domestic market. Maximum prices established in accordance with the provisions of this section shall not apply to coal sold by a code member and shipped outside the continental United States.

(f) All data, reports, and other information in the possession of the National Recovery Administration in relation to bituminous coal shall be available to the Commission for the administration of this Act.

(g) The price provisions of this Act shall not be evaded or violated by or through the use of docks or other storage facilities or transportation facilities, or by or through the use of subsidiaries, affiliated sales or transportation companies or other intermediaries or instrumentalities, or by or through the absorption, directly or indirectly, of any transportation or incidental charge of whatsoever kind or character, or any part thereof. The Commission is hereby authorized, after investigation and hearing, and upon notice to the interested parties, to make and issue rules and regulations to make this subsection effective.

(h) All sales and contracts for the sale of coal shall be subject to the code prices herein provided for and in effect at the time of the making of such sales and contracts. The Commission shall prescribe the price allowance to and receivable by persons who purchase coal for resale, and resell it in not less than cargo or railroad carload lots; and shall require the maintenance by such persons, in the resale of coal, of the minimum prices established under this Act.

(i) The following practices shall be unfair methods of competition and shall constitute violations of the code:

1. The consignment of unordered coal, or the forwarding of coal which has not actually been sold, consigned to the producer or his agent: *Provided, however,* That coal which has not actually been sold may be forwarded, consigned to the producer or his agent at rail or track yards, tidewater ports, river ports, or lake ports, or docks beyond such ports. Such limitations on the consignment of coal shall not apply to the following classes: Bunker coal, coal applicable against existing contracts, coal for storage (other than in railroad cars) by the producer or his agent in rail or track yards or on docks, wharves, or other yards for resale by the producer or his agent.

2. The adjustment of claims with purchasers of coal in such manner as to grant secret allowances, secret rebates, or secret concessions, or other price discrimination.

3. The prepayment of freight charges with intent to or having the effect of granting a discriminatory credit allowance.

4. The granting in any form of adjustments, allowances, discounts, credits, or refunds to purchasers or sellers of coal, for the purposes or with the effect of altering retroactively a price previously agreed upon, in such manner as to create price discrimination.

5. The predating or postdating of any invoice or contract for the purchase or sale of coal, except to conform to a bona fide agreement for the purchase or sale entered into on the predate.

6. The payment or allowance in any form or by any device of rebates, refunds, credits, or unearned discounts, or the extension to certain purchasers of services or privileges not extended to all purchasers under like terms and conditions, or under similar circumstances.

7. The attempt to purchase business, or to obtain information concerning a competitor's business by concession, gifts, or bribes.

8. The intentional misrepresentation of any analysis or of analyses, or of sizes, or the intentional making, causing, or permitting to be made, or publishing, of any false, untrue, misleading, or deceptive statement by way of advertising, invoicing, or otherwise concerning the size, quality, character, nature, preparation, or origin of any coal bought, sold, or consigned.

9. The unauthorized use, whether in written or oral form, of trade marks, trade names, slogans, or advertising matter already adopted by a competitor, or any deceptive approximation thereof.

10. Inducing or attempting to induce, by any means or device whatsoever, a breach of contract between a competitor and his customer during the term of such contract.

11. Splitting or dividing commissions, broker's fees, or brokerage discounts, or otherwise in any manner directly or indirectly using brokerage commissions or jobbers' arrangements or sales agencies for making discounts, allowances, or rebates, or prices other than those determined under this Act, to any industrial consumer or to any retailers, or to others, whether of a like or different class.

12. Selling to, or through, any broker, jobber, commission account, or sales agency,

which is in fact or in effect an agency or an instrumentality of a retailer or an industrial consumer or of an organization of retailers or industrial consumers, whereby they or any of them secure either directly or indirectly a discount, dividend, allowance, or rebates, or a price other than that determined in the manner prescribed by this Act.

13. Violations of the provisions of the code.

It shall not be an unfair method of competition or a violation of the code or any requirement of this Act (1) to sell to or through any bona fide and legitimate farmer's cooperative organization duly organized under the laws of any State, Territory, the District of Columbia, or the United States whether or not such organization grants rebates, discounts, patronage dividends, or other similar benefits to its members (2) to sell through any intervening agency to any such cooperative organization, or (3) to pay or allow to any such cooperative organization or to any such intervening agency any discount, commission, rebate, or dividend ordinarily paid or allowed, or permitted by the code to be paid or allowed, to other purchasers for purchases in wholesale or middleman quantities.

(j) The Commission shall have jurisdiction to hear and determine written complaints made charging any violation of the code specified in this part II. It shall make and publish rules and regulations for the consideration and hearing of any such complaint, and all interested parties shall be required to conform thereto. The Commission shall make due effort toward adjustment of such complaints and shall endeavor to compose the differences of the parties, and

shall make such order or orders in the premises, from time to time, as the facts and the circumstances warrant. Any such order shall be subject to review as are other orders of the commission.

Part III—Labor Relations

To effectuate the purposes of this Act, the district boards and code members shall accept the following conditions which shall be contained in said code:

(a) Employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from interference, restraint, or coercion of employers, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; and no employee and no one seeking employment shall be required as a condition of employment to join any company union.

(b) Employees shall have the right of peaceable assemblage for the discussion of the principles of collective bargaining, shall be entitled to select their own check-weighman to inspect the weighing or measuring of coal, and shall not be required as a condition of employment to live in company houses or to trade at the store of the employer.

(c) A Bituminous Coal Labor Board, hereinafter referred to as "Labor Board", consisting of three members, shall be appointed by the President of the United States by and with the advice and consent of the Senate, and shall be assigned to the Department of Labor. The chairman shall be an impartial person with no financial interest in the industry, or connection with any

organization of the employees. Of the other members, one shall be a representative of the producers and one shall be a representative of the organized employees, each of whom may retain his respective interest in the industry or relationship to the organization of employees. The Labor Board shall, with due regard to the provisions of the civil-service laws and the Classification Act of 1923, as amended, appoint and fix the compensation and duties of a secretary and necessary clerical and other assistants. The members shall serve for a period of four years or until the prior termination of this Act, and shall each receive compensation at the rate of $10,000 per annum and necessary traveling expenses. Any person appointed to fill a vacancy shall be appointed only for the unexpired term of his predecessor in office. Decisions of the Labor Board may be made by a majority thereof.

(d) The Labor Board shall sit at such places as its duties require, and may appoint an examiner to report evidence for its finding in any particular case. It shall notify the parties to any dispute of the time and place of the taking of evidence, or the hearing of the cause, and its finding of facts supported by any substantial evidence shall be conclusive upon review thereof by any court of the United States. It shall transmit its findings and order to the parties interested and to the Commission. The Commission shall take no action thereon for sixty days after the entry of the order of the Labor Board; and if within such sixty days an appeal is taken under the provisions of section 16 of this Act, no action on such finding and order shall be taken by the Commission during the pendency of the appeal.

(e) The Labor Board shall have authority to adjudicate disputes arising under subsections (a) and (b) of this part III, and to determine whether or not an organization of employees has been promoted, or is controlled or dominated by an employer in its organization, management, policy, or election of representatives; and for the purpose of determining who are the freely chosen representatives of the employees the Board may order and under its supervision may conduct an election of employees for that purpose. The Labor Board may order a code member to meet the representatives of its employees for the purpose of collective bargaining.

(f) The Labor Board may offer its services as mediator in any dispute between a producer and its employees where such dispute is not determined by the tribunal set up in a bona fide collective contract; and upon the written submission by the parties requesting an award on a stated matter signed by the duly accredited representatives of the employer and employees, the Labor Board may arbitrate the matter submitted.

(g) Whenever the maximum daily and weekly hours of labor are agreed upon in any contract or contracts negotiated between the producers of more than two-thirds the annual national tonnage production for the preceding calendar year and the representatives of more than one-half the mine workers employed, such maximum hours of labor shall be accepted by all the code members. The wage agreement or agreements negotiated by collective bargaining in any district or group of two or more districts, between representatives of producers of more than two-thirds of the annual tonnage production

of such district or each of such districts in a contracting group during the preceding calender year, and representatives of the majority of the mine workers therein, shall be filed with the Labor Board and shall be accepted as the minimum wages for the various classifications of labor by the code members operating in such district or group of districts.

ORGANIZATION OF THE CODE

SEC. 5. (a) Upon the appointment of the Commission it shall at once formulate said code and assist in the organization of the district boards as provided for in section 4, and shall prepare and supply to all coal producers forms of acceptance for membership therein. Such forms of acceptances, when executed, shall be acknowledged before any official authorized to take acknowledgments.

(b) The membership of any such coal producer in such code and his right to a drawback on the taxes levied under section 3 of this Act, may be revoked by the Commission upon written complaint by any party in interest, after a hearing, with thirty days' written notice to the member, upon proof that such member has willfully failed or refused to comply with any duty or requirement imposed upon him by reason of his membership; and in such a hearing any party in interest, including the district boards, other code members, consumers, employees, and the Commissioner of Internal Revenue, shall be entitled to present evidence and be heard: *Provided,* That the Commission, in its discretion, may in such case make an order directing the code member to cease and desist from violations of the code and

upon failure of the code member to comply with such order the Commission may reopen the case upon ten days' notice to the code member affected and proceed in the hearing thereof as above provided.

The Commission shall keep a record of the evidence heard by it in any proceeding to cancel or revoke the membership of any code member and its findings of fact if supported by any substantial evidence shall be conclusive upon any proceeding to review or restrain the action and order of the Commission in any court of the United States.

When an alleged violation of the code relates to the provisions of part III of section 4 of this Act, the Commission shall accept as conclusive the certified findings and orders of the Labor Board and inquire only into the compliance or noncompliance of the code member with respect thereto.

(c) Any producer whose membership in the code and whose right to a drawback on the taxes as provided under this Act has been canceled, shall have the right to have his membership restored upon payment by him of all taxes in full for the time during which it shall be found by the Commission that his violation of the code or of any regulation thereunder, the observance of which is required by its terms, shall have continued. In making its findings under this subsection the Commission shall state specifically (1) the period of time during which such violation continued, and (2) the amount of taxes required to be paid to bring about reinstatement as a code member.

(d) Any code member who shall be injured in his business or property by any other code member by reason of the doing of any act which is forbidden or the failure to

do any act which is required by this Act or by the code, may sue therefor in any district court of the United States in the district in which the defendant resides, or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

SEC. 6. (a) All rules, regulations, determinations, and promulgations of any district board shall be subject to review by the Commission upon appeal by any producer and upon just cause shown shall be amenable to the order of the Commission; and appeal to the Commission shall be a matter of right in all cases to every producer and to all parties in interest. The Commission may also provide rules for the determination of controversies arising under this Act by voluntary submission thereof to arbitration, which determination shall be final and conclusive.

(b) Any person aggrieved by an order issued by the Commission or Labor Board in a proceeding to which such person is a party may obtain a review of such order in the Circuit Court of Appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission or Labor Board be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission or Labor Board, as the case may be, and thereupon the Commission or Labor Board, as the case may be, shall certify and file in the court a transcript of

the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, and enforce or set aside such order, in whole or in part. No objection to the order of the Commission or Labor Board shall be considered by the court unless such objection shall have been urged below. The finding of the Commission or Labor Board as to the facts, if supported by substantial evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the hearing before the Commission or Labor Board, the court may order such additional evidence to be taken before the Commission or Labor Board and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission or Labor Board, as the case may be, may modify its findings as to the facts, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, and enforcing or setting aside, in whole or in part, any such order of the Commission or Labor Board, as the case may be, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

The commencement of proceedings under this subsection shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(c) If any code member fails or neglects to obey any order of the Commission while the same is in effect, the Commission in its discretion may apply to the Circuit Court of Appeals of the United States within any circuit where such code member resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the Commission. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such code member and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make, and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission. The findings of the Commission as to facts, if supported by substantial evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper.

The Commission may modify its findings as to the facts or make new findings, by

reason of the additional evidence so taken, and it shall file such modified or new findings, which if supported by substantial evidence shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(d) The jurisdiction of the Circuit Court of Appeals of the United States or the United States Court of Appeals for the District of Columbia, as the case may be, to enforce, set aside, or modify orders of the Commission or Labor Board shall be exclusive.

Such proceedings in the Circuit Court of Appeals or the United States Court of Appeals for the District of Columbia, as the case may be, shall be given precedence over other cases pending therein, and shall be in every way expedited.

SEC. 7. All provisions of the law, including penalties and refunds, relating to the collection and disposition of internal revenue taxes, shall, insofar as applicable and not inconsistent with the provisions of this Act, be applicable with respect to taxes imposed under this Act.

SEC. 8. (a) The members of the Commission and of the Labor Board are authorized to administer oaths to witnesses appearing before their respective boards; and, for the purpose of conducting its investigations, said Commission or the said Labor Board shall have full power to issue subpenas and subpenas duces tecum, which shall be as

nearly as may be in the form of subpenas issued by district courts of the United States. In case any person shall fail or refuse to obey such subpena it shall be the duty of the Commission, or the Labor Board, through its chairman, to make application to the District Court of the United States setting forth the issue and service of such subpena and the refusal of the person to obey the same and requesting such court to compel such person to appear before such court and show lawful cause for such refusal. Upon the filing of such application with the clerk of such court, it shall be the duty of the judge thereof, either in term time or vacation, to forthwith enter an order of record, requiring such person to appear before such court at a time stated in said order within three days from such entry, and show cause why he should not be required to obey such subpena, and upon his failure to show cause it shall be the duty of the court to order such witness to appear before the said Commission or Labor Board and give such testimony or produce such evidence as may be lawfully required by said Commission or Labor Board. The district court, either in term time or vacation, shall have full power to punish for contempt as in other cases of refusal to obey the process and order of such court.

(b) In the investigation of any complaint or violation of the code, or of any rule or regulation the observance of which is required under the terms thereof, the Commission or the Labor Board, as the case may be, shall have power to require such reports from, and shall be given access to inspect the books and records of, code members to the extent deemed necessary for the purpose of determining the complaint.

SEC. 9. Should any producer or producers of bituminous coal not accept and maintain membership under the code set out in section 4 of this Act, he or they shall in addition to the tax herein provided and without the privilege of any drawback thereon, be held subject to other Acts of Congress regulating industries and their labor relations or providing for codes of fair competition therein: *Provided,* That the employees of all producers shall have the right of self-organization and collective bargaining through representatives of their own choosing free from the interference, restraint, or coercion of employers or their agents, all as set forth in section 4, part III (a) and (b) of this Act.

SEC. 10. (a) The Commission may require reports from producers and may use such other sources of information available as it deems advisable, and may require producers to maintain a uniform system of accounting of costs, wages, operations, sales, profits, losses, and such other matters as may be required in the administration of this Act. No information obtained from a producer disclosing costs of production or sales realization shall be made public without the consent of the producer from whom the same shall have been obtained, except where such disclosure is warranted by a controversy with the producer over any order of the Commission and except that such information may be compiled in composite form in such manner as shall not be injurious to the interests of any producer and, as so compiled, may be published by the Commission.

(b) Any officer or employee of the Commission or of any district board who shall, in violation of the provisions of subsection (a), make public any information obtained by the Commission or the district board, with-

out its authority, unless directed by a court, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding $500, or by imprisonment not exceeding six months, or by both fine and imprisonment, in the discretion of the court.

(c) If any producer required by this Act or the code to file a report shall fail to do so within the time fixed for filing the same, and such failure shall continue for thirty days after notice of such default, the producer shall forfeit to the United States the sum of $50 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States, brought in the district where the producer has his principal office or in any district in which he shall do business. It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeiture.

SEC. 11. State laws regulating the mining of coal not inconsistent herewith are not affected by this Act.

SEC. 12. No coal may be delivered upon a contract made prior to the effective date of this Act at a price below the minimum price at the time of delivery upon such contract, as established pursuant to Part II of section 4 of this Act, and such contract shall be invalid and unenforceable: *Provided,* That this prohibition shall not apply (a) to a lawful and bona fide written contract entered into prior to October 2, 1933; nor (b) to a lawful and bona fide written contract entered into subsequent to that date and prior to May 27, 1935, at not less than the mini-

mum price current as published under the Code of Fair Competition for the Bituminous Coal Industry, pursuant to the National Industrial Recovery Act, at the time of making of such contract; nor (c) to a lawful and bona fide written contract entered into on or after May 27, 1935, and prior to the date of the approval of this Act, at not less than the minimum price for current sale as published under said code of fair competition, as at May 27, 1935.

SEC. 13. Any combination between producers creating a marketing agency for the disposal of competitive coals in interstate commerce at prices to be determined by such agency or by the agreement of the producers operating through such agency, shall be unlawful as a restraint of interstate trade and commerce within the provisions of the Act of Congress of July 2, 1890, known as the Sherman Act, and acts amendatory and supplemental thereto, unless such marketing agency shall have been approved by the Commission as provided in section 4 of this Act.

SEC. 14. (a) No bituminous coal shall be purchased by the United States, or any department or agency thereof, produced at any mine, where the producer has not complied with the provisions of the code set out in section 4 of this Act.

(b) Each contract made by the United States, or any department or agency thereof, with a contractor for any public work, or service, shall contain a provision that the contractor will buy no bituminous coal to use on or in the carrying out of such contract from any producer except such producer be a member of the code set out in section 4 of this Act as certified to by the National Bituminous Coal Commission.

SEC. 15. If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act and the application of such provisions to other persons or circumstances shall not be affected thereby.

OTHER DUTIES OF THE COMMISSION

SEC. 16. The Commission shall study and investigate the matter of increasing the uses of bituminous coal and the problems of its importation and exportation; and shall further investigate—

(1) The economic operations of mines with the view to the conservation of the national coal resources.

(2) The safe operation of mines for the purpose of minimizing working hazards, and for such purpose shall be authorized to employ the services of the Bureau of Mines.

(3) The rehabilitation of mine workers displaced from employment, and the relief of mine workers partially employed. The Commission's findings and recommendations shall be transmitted to the proper agency of the Government for relief, rehabilitation, and subsistence homesteads.

(4) The problem of marketing to lower distributing costs for the benefit of consumers.

(5) The Commission shall, as soon as reasonably possible after its appointment, investigate the necessity for the control of production of bituminous coal and methods of such control, including allotment of output to districts and producers within such districts, and shall hold hearings thereon, and shall report its conclusions and recommendations to the Secretary of the Interior

for transmission by him to Congress not later than January 6, 1936.

SEC. 17. Upon substantial complaint that bituminous-coal prices are excessive, and oppressive of consumers, or that any district board, or producers' marketing agency, is operating against the public interest, or in violation of this Act, the Commission may hear such complaint, or appoint a committee to investigate the same, and its findings shall be made public; and the Commission shall make proper orders within the purview of this Act so as to correct such abuses. Complaints may be made under this section by any State or political subdivision of a State.

SEC. 18. To safeguard the interests of those concerned in the mining, transportation, selling, and consumption of coal, the Commission is hereby vested with authority to make complaint to the Interstate Commerce Commission with respect to rates, charges, tariffs and practices relating to the transportation of coal, and to prosecute the same. Before proceeding to hear and dispose of any complaint filed by another than the Commission, involving the transportation of coal, the Interstate Commerce Commission shall cause the Commission to be notified of the proceeding and, upon application of the Commission, shall permit the Commission to appear and be heard. The Interstate Commerce Commission is authorized to avail itself of the cooperation, services, records and facilities of the Commission.

SEC. 19. The term "bituminous coal" as used in this Act shall include all bituminous, semibituminous, and subbituminous coal and lignite. The term "producer" shall include all persons, firms, associations, corporations,

trustees, and receivers engaged in mining bituminous coal. The term "captive coal" shall include all coal produced at a mine for consumption by the producer or by a subsidiary or affiliate thereof, or for use in the production of coke or other forms of manufactured fuel by such producer or subsidiary or affiliate.

SEC. 20. Section 3 of this Act shall become effective on the 1st day of the third calendar month after the enactment of this Act, unless the Commission shall not at that time have formulated the code and forms of acceptance for membership therein, in which event section 3 of this Act shall become effective from and after the date when the Commission shall have formulated the code and such forms for acceptance, which date shall be promulgated by Executive order of the President of the United States. All other sections of this Act shall become effective on the day of the approval of this Act.

SEC. 21. This Act shall cease to be in effect and any agencies established thereunder shall cease to exist on and after four years from the date of the approval of this Act.

SEC. 22. There is hereby authorized to be appropriated from time to time such sums as may be necessary for the administration of this Act.

SEC. 23. This Act may be cited as the "Bituminous Coal Conservation Act of 1935."

ANNEX TO ACT—SCHEDULE OF DISTRICTS
(Omitted)

U. S. GOVERNMENT PRINTING OFFICE: 1935